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PRINTED FOR
 THE PUBLISHERS,
 BY MORRISON AND GINN LIMITED,
July 1897,

ENCYCLOPÆDIA
OF THE
LAWS OF ENGLAND

BEING A
NEW ABRIDGMENT
BY THE
MOST EMINENT LEGAL AUTHORITIES

UNDER THE GENERAL EDITORSHIP OF
A. WOOD RENTON, M.A., LL.B.
OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME III
CHICORY TO COUNTY COURTS

LONDON
SWEET & MAXWELL LD.
3 CHANCERY LANE

EDINBURGH
WM. GREEN & SONS
18 AND 20 ST. GILES STREET
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The Articles in this Volume have been
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July 1st, 1897.



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ENCYCLOPÆDIA

THE LAWS OF ENGLAND

Chicory.—A vegetable matter, used for admixture with or in substitution for coffee. It is subject to a customs duty on importation of 13s. 3d. per cwt. if raw or kiln-dried, or of 2d. per lb. if roasted or ground. This duty also applies to all other vegetable matters applicable to the uses of chicory or coffee (39 & 40 Vict. c. 35, sched.). For the regulation of import and the collection of duties, see CUSTOMS. Under sec. 42 of the Customs Consolidation Act, 1876, 39 & 40 Vict. c. 36, there is a prohibition on importation of any extract essence or other concentration of chicory, or any admixture of the same, "except in transit, or to be warehoused for export only."

Chicory and such other vegetable matters, if grown in the United Kingdom, are subject to an excise duty of 12s. 8d. per cwt. if raw or kiln-dried, and so on in proportion for any greater or less quantity. The business of a dryer or roaster of chicory is for the purpose of ensuring the recovery of this duty, subject to regulation by secs. 8–21 and 33 of the Excise Act, 1860, 23 & 24 Vict. c. 113. He must make entry of the premises on which he means to exercise his business (s. 8), and provide a warehouse for storing the chicory when dried, where alone it may be stored (ss. 9–12). He must give notice to the Excise of his intention to dry chicory (s. 10), and of his intention to remove it from the kiln or drying apparatus (s. 11); and may not remove it, from kiln to warehouse, except subject to Excise regulations, except in presence of an excise officer (ss. 13–19). He must provide scales and weights and assist in weighing it for duty (s. 16). He may not possess any dried chicory not dried in his own kiln (s. 17), and must not roast chicory or coffee on the drying premises, except by licence granted in the case of combined businesses existing in 1860 (s. 18).

Provision is made as to possession of duty-paid foreign chicory (s. 19). The penalties for disobedience to the Act are provided partly by the sections imposing the particular obligations, partly by a general provision in sec. 33, and are recoverable under the Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21. See EXCISE.

The sale of chicory is subject to the same general regulations as other articles of food, and to certain special regulations with respect to its admixture with or sale as coffee. See ADULTERATION; COFFEE.

Chief Clerks, Certificate of Masters of.—See **MASTERS OF SUPREME COURT.**

Chief Commissioner of Police.—See **POLICE, METROPOLIS.**

Chief Constable.—The head officer of a borough or county police force.

1. In boroughs which have a separate police force, he is appointed by the watch committee of the town council (10 & 11 Vict. c. 89, s. 6; 45 & 46 Vict. c. 50, ss. 190–196), but only in boroughs which are counties in themselves does he appear to be entitled to be called chief constable. See **POLICE, BOROUGH.**

2. In a county (including an administrative county which has a separate Court of Quarter Sessions or a separate county rate, and every liberty of a county which has a separate commission of the peace, except a borough with less than 10,000 population) he is appointed by the standing joint-committee formed by the county justices and the county council, subject to the approval of a Secretary of State (County Police Act, 1839, 2 & 3 Vict. c. 93, ss. 4, 24, 28; Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 9). Where a county has two or more parliamentary divisions, two chief constables may be appointed (2 & 3 Vict. c. 93, s. 4). Where required, the same chief constable can be appointed for two or more adjoining counties, subject to the approval of the standing joint-committee of each county (20 Vict. c. 2, s. 2; 51 & 52 Vict. c. 41, s. 9). He can appoint a deputy, subject to the approval of the standing joint-committee (2 & 3 Vict. c. 93, s. 7). He has within the county, and all liberties, franchises, and detached parts thereof, all the powers and duties of a constable within his constableness, whether at common law or any past or future statute (2 & 3 Vict. c. 93, ss. 8, 27; 3 & 4 Vict. c. 88, s. 34; 19 & 20 Vict. c. 69, s. 6; 51 & 52 Vict. c. 41, ss. 9, 39 (1)), and also the duty of attending at general and Quarter Sessions, and making quarterly reports to the county justices of all matters which they require, and monthly to the clerk of the peace a return of the disposition and number of the constables under his orders (2 & 3 Vict. c. 93, s. 17; 3 & 4 Vict. c. 88, s. 31).

He appoints superintendents and petty constables, subject to the approval of a Petty Sessional Court; and may dismiss any superintendent or petty constable, and is subject to the lawful order of the standing joint-committee and the rules established for the government of the county police force made by a Secretary of State (2 & 3 Vict. c. 93, ss. 3, 6; 3 & 4 Vict. c. 88, s. 26). These powers extend to borough forces consolidated with the county force (3 & 4 Vict. c. 88, s. 15).

He is forbidden to canvass but not to vote at a parliamentary or municipal election (19 & 20 Vict. c. 69, s. 9; 22 & 23 Vict. c. 32, s. 3; 56 & 57 Vict. c. 6).

He is substituted for the now abolished high constable, for the purpose of actions or claims against a hundred or other like district (32 & 33 Vict. c. 47, s. 5). See **POLICE, COUNTY.**

Children.—See **CRUELTY TO CHILDREN; WILLS.**

Chiltern Hundreds. — The stewardship of the Chiltern Hundreds, that is to say of the three hundreds of Stoke, Desborough, and Burnham, in the county of Buckingham, is an ancient office under the Crown, which is kept up, as explained below, for the purpose of enabling members of the House of Commons to vacate their seats, though the duties and emoluments attached to it have long since disappeared. It appears from the records of the time of Edward I., known as the Hundred Rolls, that these three hundreds were then in the king's hands. They were managed by a royal steward as bailiff, who answered for the rents and profits, and had a court leet, returns of writs, and other privileges and profits within his bailiwick. The steward of the Chilterns and the other Crown stewards were appointed in the Exchequer, and eventually the right of appointment passed to the Chancellor of the Exchequer, in his capacity of Under-Treasurer, an office united to the Chancellorship in the time of Henry VIII. At the present day the Chancellor only appoints to the Chilterns and Northstead stewardships.

In 1615 James I. granted the Chiltern Hundreds by letters patent to Sir Francis Goodwin for three lives at the rent of £1, 6s. 8d. per annum; and in 1679 a Treasury warrant was made out for the grant of the "custody, stewardship, and bailiwick" of the three hundreds to Thomas D'Oyley for a term of thirty-one years at a yearly rental of £1, 6s. 8d. and a fine of £150. In the course of time the Stewards' Courts ceased to be held, and the rents reserved to the Crown were sold as fee-farm rents; so that probably the office of steward had ceased to be one of any substantial profit before the year 1750, when it was first used for its present purpose. There is said to have been a nominal salary of 20s. or 25s. until shortly before 1839.

An ancient rule dating from the time when service in the House of Commons was regarded as a burden rather than a privilege, prevented members from resigning their seats. In 1623 the House resolved that "a man after he is duly chosen cannot relinquish." In the middle of the eighteenth century an indirect method of resignation was discovered in the provisions of the Place Bill, 6 Anne, c. 41, ss. 25, 26, that members of the House of Commons accepting any place of profit under the Crown other than a higher commission in the army, should thereby vacate their seats (but with right of re-election in the case of offices created before October 25, 1705). It had been decided in 1740 that Sir Watkins Williams Wynn by succeeding on his father's death to the reversion of the stewardship of Bromfield and Yale, held under a grant from the Crown, at a salary of £20, had accepted an office under the Crown which vacated his seat. In 1750 the Chilterns' stewardship was granted to John Pitt to enable him to vacate his seat and stand for another constituency. In 1757 it was granted to the elder Pitt on his return to office to hasten his re-election. In 1774 Lord North refused to grant it to a member who desired to vacate his seat for the purpose of standing for another constituency against a supporter of Lord North's. This proceeding, which would not now be imitated, led to the introduction of a bill to enable members to resign their seats, but the proposal was defeated.

In 1893 the principles on which the office is now granted were explained by Sir William Harcourt as follows (Parliamentary Debates, 31st January 1893, p. 50):—"First of all, it is the duty of the Chancellor of the Exchequer to grant the Chiltern Hundreds immediately when they are asked for, unless there is some reason to the contrary. . . . In the second place, the grant has

no reference to the character or fitness of the applicant. That is shown by the charge in the warrant to which I have referred." (The words attaching honour and credit to the office were struck out of the warrant in view of the occasional necessity of granting it to undesirable members.) "Thirdly, the action of the Chancellor of the Exchequer is purely ministerial. He has not the duty or the right or the means to investigate cases of suspicion. . . . Fourthly, there are no exceptions to these rules except in, or to maintain the authority of the House in, cases where it has jurisdiction, as in matters relating to elections. There the House does not allow its jurisdiction to be defeated as it would be by the withdrawal of the question." But see further, the paper quoted below, at p. 61.

The offices of Steward of the Chilterns and of Steward of the Crown Manor of Northstead are now granted alternately by the Chancellor of the Exchequer for this purpose. The seat is vacated by the acceptance of the office. The warrant made out on each new grant revokes the previous grant. On some occasions the same office has been granted twice on the same day. The office may be granted during the recess, but in that case a new writ does not issue until the meeting of Parliament (21 & 22 Vict. c. 110). In Ireland after the passing of the Place Act of 1793, 33 Geo. III. c. 41, which corresponded to the English statute of Anne, the Escheatorships of Munster and Ulster were granted by the Lord Lieutenant of Ireland by letters patent under the Great Seal of Ireland to enable members of the Irish House of Commons to vacate their seats. These offices were used for this purpose after the Union until 1820; they were abolished in 1838, though the Escheatorship of Munster was erroneously treated as surviving in 21 & 22 Vict. c. 100.

The above is founded on the paper laid before the Select Committee of the House of Commons on Vacating of Seats, Parliamentary Papers, 1894, H. C. 278, see p. 1, etc., and pp. 52-80.

Chimney.—1. *Construction.*—The construction of chimneys and flues is regulated outside London by the Chimney Sweepers, etc., Act, 1840, 3 & 4 Vict. c. 85, and sec. 157 of the Public Health Act, 1875, 38 & 39 Vict. c. 55. The first Act provides for the materials, diameter and angles of a chimney. The latter empowers the making of by-laws. In London their construction is regulated by secs. 64-67 of the London Building Act, 1894, 57 & 58 Vict. c. ccciii.

2. *Fires.*—There is no statutory duty requiring the sweeping of chimneys, but the provisions of the law come very near to imposing that duty.

In London, including the city, the occupier of a house whose chimney catches fire, irrespective of any question of negligence, is liable to a penalty not exceeding 20s., recoverable before a Court of summary jurisdiction. If he can prove that the fire was due to the neglect or wilful default of another person, he can recover the penalty by purely summary proceedings (Metropolitan Fire Brigade Act, 1867, 28 & 29 Vict. c. 90, s. 23).

Outside London, in boroughs and other urban districts, the occupier or user of premises whose chimney catches on fire by accident, is liable to a penalty, recoverable summarily, not exceeding 10s., unless he can show that the accident in nowise arose from the carelessness, neglect, or omission of himself or his servant (10 & 11 Vict. c. 89, s. 31; 38 & 39 Vict. c. 55, s. 171). And wilfully setting a chimney on fire or causing it to be set on

fire is punishable by a penalty not exceeding £5, recoverable summarily (10 & 11 Vict. c. 89, s. 30; 38 & 39 Vict. c. 55, s. 171). This enactment was passed to put a stop to the north country practice of cleaning a chimney by setting fire to the soot in it. The summary remedy does not exclude the right to proceed by indictment for arson in a proper case (10 & 11 Vict. c. 89, s. 30).

3. *Sweeps.*—The business of chimney-sweeper is regulated by four Acts of Parliament. The first (3 & 4 Vict. c. 85), passed in 1840, put an end to the abuses then existing as to the apprenticeship and servitude of young children in this trade.

The Act of 1840 (s. 3) forbids the apprenticeship to the trade of any child under sixteen, and makes the indentures void.

The Act of 1864 (s. 6) forbids the employment of a child under ten to do or assist in any work connected with the trade, except at the house or place of business of the sweeper. Under sec. 7 a chimney-sweeper may not bring a person under sixteen in his employment or under his control to a place where he is going to sweep a chimney or clear a flue. And under sec. 1 of the Act of 1840, no person under twenty-one may ascend or descend a chimney or flue. The penalty for these offences is a fine not exceeding £10, recoverable summarily, and payable half to the informer and half to the poor of the parish in which the offender lives (3 & 4 Vict. c. 85, ss. 7, 8, 12; 28 & 29 Vict. c. 37, ss. 5, 8, 9, 10, 11). There is an appeal to Quarter Sessions from a conviction (3 & 4 Vict. c. 85, s. 11; 27 & 28 Vict. c. 37, s. 4). See *APPEALS (to Quarter Sessions)*.

• The enforcement of these Acts is put under the special but not exclusive superintendence of the police by the Act of 1878, 38 & 39 Vict. c. 70, s. 21, the provisions of which are cumulative upon, and not exclusive of, the regulations of the Vagrancy Acts and local statutes and by-laws for the control of chimney-sweepers (ss. 24, 25). Under that Act, no master chimney-sweeper is allowed to practise without a certificate from the chief officer of police in the district in which he practises (38 & 39 Vict. c. 70, ss. 5, 6, 9), which is available in other districts on indorsement by the chief officer of police for that district (s. 13). The certificate is issued after an application in the form prescribed by the Act, delivered at the police station nearest to the applicant's dwelling, and lasts for a year from its date. A fee of 2s. 6d. is charged for the certificate (s. 10), and goes to the pension fund of the police force for the district (57 & 58 Vict. c. 51, s. 2).

A chimney-sweeper must give his name and address on demand by any person for whom he offers to act or acts as chimney-sweeper, or to any justice or constable (1874, s. 16). The certificate must be produced on demand (s. 17), is not assignable (s. 18), and is necessary to authorise carrying on business (s. 15), and can be taken away by the justices on conviction of an offence under the Acts of 1840 and 1874 (1874, s. 20). Penalties recoverable summarily without appeal are provided for breaches of secs. 15–18 of the Act of 1874. Fabrication or falsification of a certificate, or making false statements to obtain one, or use of a fabricated or falsified certificate, are also summarily punishable under sec. 19.

• Under the Act of 1894 (57 & 58 Vict. c. 51, s. 1) chimney-sweepers are forbidden to knock at houses from door to door, or ring a bell, or use a noisy instrument, or to the annoyance of any inhabitant to ring the door bell of a house with a view to solicit custom, under a penalty not exceeding 20s., recoverable summarily.

Chivalry, Guardians In.—See TENURES.

Chlorodyne.—A proprietary medicine containing morphia and chloroform, which can be sold only by chemists or druggists or apothecaries in accordance with the provisions of the Pharmacy and Sale of Poisons Act, 1868, 31 & 32 Vict. c. 12, ss. 15–17 (*Pharmaceutical Society v. Piper* [1893], 1 Q. B. 686; *Same v. Armson* [1894], 2 Q. B. 720).

Chloroform is one of the poisons scheduled to the Pharmacy and Sale of Poisons Act, 1868, 31 & 32 Vict. c. 121, Sched. A, part 2, which may only be sold subject to the restrictions and precautions prescribed by secs. 15, 16, 17 of the Act. See POISON.

Cholera.—See DISEASE.

Choses In Action.—This phrase had originally a clear and definite meaning—viz. a right to take proceedings in a Court of law to recover a debt or damages. In this sense it was opposed to chattels or choses in possession which were tangible personal property. Then, as the jurisdiction of the Court of Chancery arose and extended, there came to be equitable choses in action—rights, that is, to sue in equity for relief which could not (before 1875) be obtained in a Court of law. Thus a legacy was called an equitable chose in action, because, if the executor withheld payment, the only remedy of the legatee was in equity; no action lay at law for a legacy (*Deeks v. Strutt*, 1794, 5 T. R. 690). And there was this marked distinction between legal and equitable choses in action: the former class were not transferable at common law; but the latter were assignable from one person to another, and the assignee might sue in equity in his own name. See ASSIGNMENTS OF CHOSSES IN ACTION, vol. i. pp. 352, 353. In modern times there sprung up several species of incorporeal personal property which were unknown to our ancestors, such as consols, stock, shares, patents, and copyrights; and all these for want of a better classification were also called *choses in action*; so that term now practically includes “all personal chattels which are not in possession” (per Lord Blackburn in *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 440). Even a ticket in a Derby sweep-stakes has been held to be a chose in action (*Jones v. Carter*, 1845, 8 Q. B. 134). See, however, *May and Another v. Lane*, 1894, 64 L. J. Q. B. 237, which is discussed on p. 355 of vol. i.

Bankruptcy.—Where any part of the property of a bankrupt consists of choses in action, they shall be deemed to have been duly assigned to the trustee (Bankruptcy Act, 1883, s. 50, subs. 5). Debts due or growing due to the bankrupt in the course of his trade or business are within the order and disposition clause; all other choses in action are not (*ibid.* s. 44, subs. 3). The right of a lessee in equity to be relieved against a forfeiture is a chose in action within sec. 50, and on the bankruptcy of the lessee it passes to his trustee, who may assign it to a purchaser (*Howard v. Fanshawe* [1895], 2 Ch. 581).

Marriage.—The word “property” in the Married Women’s Property Act, 1882, includes choses in action (s. 24). Hence the choses in action of

any woman married after January 1, 1883,—and all choses in action which accrue after that date to any woman married before that date,—are now her separate property, which she can acquire, hold, and dispose of, in the same manner as if she were a *feme sole* (ss. 1, 2, 5). A wife may, however, assign her chose in action to her husband; so may a husband to his wife (44 & 45 Vict. c. 41, s. 50). See HUSBAND AND WIFE and CHOSSES IN POSSESSION.

Death.—The bequest of any chose in action to a person named is a specific legacy, even though the indorsement of the executors be necessary before they can be reduced into possession. "The executors are bound to do that which is required to get in the legacy, and hand it over to the legatee" (*In re Robson* [1891], 2 Ch. 559). But under a general bequest of the goods and chattels in a particular house choses in action will not pass (*Green v. Symonds*, 1730, 1 Bro. C. C. 129 n.; *Moore v. Moore*, 1781, *ibid.* 127).

Choses in Action, Offences as to.—There is no criminal remedy at common law for interference with the ownership by another of a chose in action as such, except by prosecution for conspiracy to cheat and defraud or for a common law cheat or common law forgery (see *Calyc's case*, 1684, 8 Co. Rep. 33; *R. v. Watts*, 1853, 23 L. J. M. C. 56). This rule extends to evidences of title to a chose in action. Most of the statutory penalties for theft, forgery, or damages to securities or documents which constitute a chose in action are collected in the Criminal Law Consolidation Acts of 1861. See FACTOR; FALSE PRETENCES; FORGERY; LARCENY.

The mortgagor or seller of choses in action or his solicitor or agent who conceals from the mortgagee or purchaser written instruments of title to the chose in action or incumbrances thereon, or falsifies a pedigree on which the title depends, in order to induce the purchaser or mortgagee to accept the title as good, and with intent to defraud, is guilty of a misdemeanour, and liable to imprisonment with or without hard labour for not over two years (22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8). Prosecutions may not be instituted without the sanction of the Attorney-General or Solicitor-General. The offence seems to be triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). The criminal remedy does not bar civil remedies.

Choses in Possession.—A term used in opposition to CHOSSES IN ACTION (*q.v.*) to denote tangible and moveable personal chattels of which a person has not only the absolute ownership, but also the possession. The possession may, however, be either absolute or qualified; it is qualified when the person entitled to it "has not an exclusive right, or not a permanent right, but a right which may sometimes subsist and at other times not subsist, as in the case of game, water, and goods pawned or pledged upon condition" (Smith, *Real and Personal Property*, 6th ed., s. 893; see also Williams, *Personal Property*, 14th ed., pp. 43 *et seq.*). The distinction between a chose in possession and a chose in action was much more marked in the old law than it is now. A chose in possession has always been freely transferable by delivery; in this respect differing from a chose in action, which formerly was not assignable in law, although it was in equity. There were other important points of difference in the old law, *e.g.* a chose in action could not, although a chose in possession might, be the subject of larceny; and prior to the Married Women's Property Act a woman's choses in possession vested immediately on her marriage in her husband, whereas her choses in action did not become her husband's absolute property until he reduced them into possession.

though not to previously ask the name. But as all mention of the name is omitted in the Confirmation Offices of the second and subsequent Prayer-Books, it has been thought by some that the power of changing a Christian name at confirmation no longer exists. This, however, is contrary to the opinion of Lord Coke (1 *Inst.* 3), and to a case there cited by him, the form of the Confirmation Office being in his time the same as now. In 1707, also, the Bishop of Lincoln changed a name at confirmation, and ordered the new name to be entered in the register; and for later cases see *Notes and Queries*, 4th series, vi. 17; 7th series, ii. 77. It appears from the above cases that the power of alteration is not confined to objectionable names. In practice, a name is sometimes added at confirmation.

[*Authorities.*—Hook's *Church Dictionary*; Phillimore's *Ecclesiastical Law*, 2nd ed.]

Christianity.—"There is abundant authority for saying that Christianity is part and parcel of the law of the land." So Kelly, C. B., said in *Cowan v. Milbourn*, 1867, L. R. 2 Ex. at p. 234. But the statement must not be taken too literally. It is true that Christianity is the religion of the Church which is by law established in this country; and that it has had a large share in making our law what it is. But in no other sense is Christianity part of the law of England. Our law recognises and protects the Jewish religion and other beliefs which are opposed to Christianity (see 9 & 10 Vict. c. 59; 32 & 33 Vict. c. 68; 33 & 34 Vict. c. 49; 51 & 52 Vict. c. 46).

Lord Hale was the first to assert that "Christianity is parcel of the laws of England," in 1676, in the course of his judgment in *R. v. Taylor*, as reported in 1 Ventris, 293. The *dictum* does not appear in the report of the same case in 3 Keble, 607. The Chief Justice was dealing with the objection that blasphemous words such as Taylor had uttered were punishable only in the ecclesiastical Court: he held they were cognisable also in a secular Court, because they were a danger to the State. "And," he added, "Christianity is parcel of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law." See the judgment in full, *ante*, vol. ii. p. 173. It was merely an *obiter dictum*; and it was not a sound argument. For, as the Commissioners on Criminal Law remarked in their Sixth Report (May 3, 1841, p. 83), "It is not criminal to speak or write either against the common law of England generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance." See also Jefferson's Letter to Major Cartwright, published in Cartwright's *Life and Correspondence*. Lord Hale's *dictum* has been often repeated; it is a pleasant phrase to quote; but it has no precise meaning. See BLASPHEMY.

Christmas Day.—This day, the Festival of the Birth of Christ, has been observed in the Christian Church from very early times; and, since the fifth century, on the 25th of December. In England, in addition to being one of the Festivals appointed to be observed in the Book of Common Prayer, with a proper collect, epistle, gospel, preface, psalms, and lessons, and the recitation of the Athanasian Creed, it is recognised by the State as a public holiday, by ancient custom and by various statutory provisions. Thus by the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, ss. 14, 92,

it is a "non-business day," bills falling due on which are payable the preceding business day. By 37 & 38 Vict. c. 49 (1874), provision is made for the closing of public-houses during certain hours of the day; 41 Vict. c. 16 (1877), ss. 22, 50, directs that the whole day shall be a holiday in factories, unless all the employés be Jews; and the remaining statutory provisions with regard to the day are 1 & 2 Will. IV. c. 32, s. 3 (1831), forbidding under a penalty the killing of game thereon; 2 & 3 Vict. c. 47, s. 51 (1839), enabling the Commissioner of Police in the Metropolis to make rules regulating the traffic during divine service on the day; and 39 & 40 Vict. c. 36, s. 8 (1876), declaring the day a public holiday in the Customs. Order 64, rule 2 of the R. S. C. directs that Christmas day shall be excluded in certain computations of time (*q.v.*) (see also BANK HOLIDAYS; BUSINESS DAYS); and Order 67, r. 12, forbids the serving thereon in Admiralty actions of any instrument except a warrant. It is also one of the customary quarter days.

Church.—As to Church generally, see PARISH CHURCH. See also NAVE; AISLE; CHANCEL; INCUMBENT; ECCLESIASTICAL CORPORATIONS.

As to Churches under Ecclesiastical Commissioners, see ECCLESIASTICAL COMMISSIONERS.

Church Building Acts.—The powers of the Church Building Commissioners were extinguished by the Act 19 & 20 Vict. c. 25, which transferred them to the ECCLESIASTICAL COMMISSIONERS (*q.v.*) from 1st January 1857.

Church of England.—The Church of England, *Ecclesia Anglicana*, claims to be the branch of the Catholic Church in England.

The Church of England requires her members to believe in "the Holy Catholic Church" (Apostles' Creed) and "one Catholic and Apostolic Church" (Nicene Creed). For the meaning of the word "catholic" as understood in English ecclesiastical law, see the letter of George Bull, Bishop of St. David's, to Bossuet, Bishop of Meaux, cited by Sir R. Phillimore, Official Principal of the Arches Court (*Martin v. Mackonochie*, 1868, L. R. 2 Ad. and Ec. pp. 170, 171).

In a manifesto issued in March 1851 by the two archbishops and twenty bishops of the Church of England, in view of a bull promulgated by the then Pope, Pius the Ninth, in which he had divided England and Wales into Roman Catholic dioceses, a declaration was made to the effect that the Church of England at the Reformation had rejected certain corruptions and innovations of Rome, and established "one uniform ritual," but without in any degree severing her connection with the ancient Catholic Church (see, further, the authorities cited by Sir R. Phillimore in *Martin v. Mackonochie*, *supra*; Phillimore, *Ecclesiastical Law*, 2nd ed., vol. i. ch. ii).

The word "Protestant" occurs in the Coronation service, in the repealed portions of the Act of Union, and in certain modern Acts of Parliament, e.g. 3 & 4 Vict. c. 33; 5 Vict. c. 6, in reference to the Church of England and the Protestant Episcopal Church in Scotland, and the Protestant Episcopal Church in the United States of America; but it has never been adopted by the Church of England in any formulary, and its statutory use must be taken to indicate the independent national existence of the Church

of England, and her independence of the See of Rome, and not as expressing any identity of position or doctrine between the Church of England and general foreign Protestantism as such (Phillimore, *Ecclesiastical Law*, *supra*). On the contrary, the Church of England recognises the holy orders of the Greek and Roman Church, but not those of foreign Protestant bodies (see HOLY ORDERS).

It should be added that the word "Catholic" is occasionally restricted in popular conversation to the members of the Roman Catholic communion. Whatever other justification may be pleaded for this, so far as England is concerned there is no legal authority for such a use of the word. The attempt to restrict the word "Catholic" to this sense is dealt with by Bishop Bull in the letter quoted in *Martin v. Mackonochie*, *supra*. "But it seems that no other union of the Church will satisfy the bishop but an union of all the Churches of Christ in the world, under one visible head, having a jurisdiction over them all, and that head the Bishop of Rome. But such an union of Christians was never dreamed of amongst Christians for at least the first six hundred years, as shall be shown in its due place."

It seems a generally accepted fact, though in modern times it has been called in question by controversial writers, that English Roman Catholics attended the services of the Church of England until Pope Pius v. in 1570 issued a bull excommunicating Queen Elizabeth; after which they formed themselves into a separate body. English Roman Catholics after this were first known to the law as papists, or as popish recusants, if they refused to conform; subsequently as Roman Catholics, the Act 10 Geo. iv. c. 7, being entitled an Act for the relief of His Majesty's Roman Catholic subjects.

The organisation of the Church of England was the work of Archbishop Theodore, 668, who first organised the episcopate in one province and laid the foundations of the parochial system. The separate province of York was finally constituted in 734. (See BISHOP and ARCHBISHOP.) The Welsh dioceses representing the ancient British Church were for centuries outside both provinces, and they cannot be said to have formed a part of the province of Canterbury until after the Norman Conquest.

Relation of Church and State.—The Church of England is legally described as "by law established," but the sense in which this expression must be understood is best explained by Sir William Anson (*Law and Custom of the Constitution*, p. 378), in his account of the Royal Supremacy, when he says, "The Queen is head of the Church, not for the purpose of discharging any spiritual function, but because the Church is the National Church, and as such is built into the fabric of the State."

Yet although a connection between Church and State has always existed from the earliest times, it has considerably varied at different epochs. In the Anglo-Saxon period it may be stated briefly that the Church and State were practically identical—religion, morality, and law being recognised as one and the same thing, although there was no question in such times as to the organisation or powers of the Church and State respectively. Whether ecclesiastical Courts properly so called existed in the Anglo-Saxon period must be considered as doubtful. In any case the distinction which exists between the civil and ecclesiastical Courts was a result of the Norman Conquest. Thereafter Church and State ceased to be identical. The ecclesiastical and the civil Courts were separated (see ARCHDEACON), and the adoption by the former of the canon law made the pope the ultimate judge of ecclesiastical cases. (See CANON LAW; ECCLESIASTICAL LAW.)

The synods of the two provinces, which by the close of the tenth century had grown into the Convocations of Canterbury and York, exercised the

right of legislating for the Church by canon. At the same time, although the relations between Church and State had been considerably modified, the Crown still, in virtue of the prerogative, exercised a considerable control.

In the same way, Parliament, from its first institution, exercised the right of legislation on ecclesiastical matters, especially in the way of checking the encroachments of the See of Rome on the independence of the National Church.

The Crown and the common law Courts also asserted their jurisdiction over property vested in ecclesiastical corporations, and various statutes were passed to limit the acquisition of land by them.

The position of the Church was both defined and modified by the legislative enactments of Henry VIII., Edward VI., and Elizabeth, measures which in England effected the constitutional and doctrinal changes known as the Reformation.

It was not the object of the framers of the Reformation statutes either to establish a new faith or to create a new Church. The general principle of the Reformation on its doctrinal side is stated in article 35: "Every particular or National Church hath authority to ordain, change, and abolish ceremonies or rites of the Church ordained only by man's authority." In answer to a request on the part of foreign princes that she would tolerate the Roman Catholics as a separate ecclesiastical body, Elizabeth refused, on the ground that "there was no new faith propagated in England."

On the *doctrinal* side, the Church of England at the Reformation repudiated certain mediæval accretions of doctrine, and remodelled and translated into the vernacular its forms of service and formularies, and determined certain points of controversy by her Thirty-nine Articles (see ARTICLES, THIRTY-NINE); but as before, so after the Reformation, the law of the Church of England and her history are to be deduced from the ancient canon law, from the particular constitutions made in this country to regulate the English Church, from the rubric, and occasionally from Acts of Parliament; and the whole may be illustrated also by the writings of eminent persons.

Constitutionally, the Reformation took the form of a restoration to the Crown of its ancient jurisdiction over the estate ecclesiastical and spiritual, and an abolition of all foreign powers repugnant to the same (see the Act of Supremacy, 1 Eliz. c. 1). The title, the "only supreme head on earth of the Church of England," which was conferred on the Crown by 26 Hen. VIII. c. 1, was abolished by the repeal of that Act by 1 & 2 Philip and Mary, c. 8. The Act of Supremacy, however, required all holders of office to acknowledge by oath that the Queen was sovereign over all persons and causes ecclesiastical and temporal, to the exclusion of all foreign princes, persons, prelates, states, and potentates. Under sec. 17 of the same Act, all ecclesiastical jurisdiction which might lawfully be exercised by visitation, etc., was vested in the Crown, which was empowered, under sec. 18, to exercise its jurisdiction by commissioners. Under these sections, the Court, commonly known as the Court of High Commission (commissions for causes ecclesiastical) was appointed; but it was abolished by 16 Car. I. c. 11, which repealed clause 18 of the Act 1 Eliz. c. 1.

The Crown, further, has no right, in virtue of its ecclesiastical supremacy, to create a Court in the nature of the High Commission Court.

The abolition of papal jurisdiction (24 Hen. VIII. c. 12) rendered necessary the creation of an ecclesiastical Court of final jurisdiction. Under 25 Hen. VIII. c. 19, it was enacted that an appeal should be to the king in Chancery from the Courts of the archbishops, and that on such appeal a

commission should be appointed, under the Great Seal, to try each case *ad hoc*. These commissioners were known as the Court of Delegates, a tribunal which remained an integral part of our Church system until 1832. In the year just mentioned the Act 2 & 3 Will. IV. c. 92 transferred ecclesiastical appeals to the Privy Council. Such appeals are now heard by the Judicial Committee of the Privy Council, which was constituted by the Act 3 & 4 Will. IV. c. 42. (See PRIVY COUNCIL.)

In virtue of its ancient prerogative and the canon law, which declares the consent of a prince to be necessary to an episcopal appointment, the Crown (although the first clause of Magna Charta, which seems to be aimed at the practice, is still unrepealed) has generally claimed and exercised a paramount voice in this respect. The right, however, is now practically regulated by statute. (See CONGÉ D'ÉLIRE; ARCHBISHOP; BISHOP.)

In the same way, the Crown is guardian of the temporalities during the vacancy of the See. Its right to appoint deans is at present purely statutory (see DEAN AND CHAPTER).

Convocation (*q.v.*) can only be summoned by the Royal consent, and by the statute (25 Hen. VIII. c. 19, 1532) which embodied the submission of the clergy. The convocations can only be summoned by Royal writ, and cannot enact canons without Royal licence; and it has been held that, even if such canons do receive the Royal assent, they are not binding upon the laity, unless in so far as they are declaratory of ancient custom (*Middleton v. Crofts*, 1736, 2 Atk. 650). (As to jurisdiction of ecclesiastical Courts, see ECCLESIASTICAL LAW and CONSISTORY COURT.)

Doctrines of.—The doctrines and discipline of the Church of England are comprised in part in the Thirty-nine Articles and the Book of Common Prayer, but the Church of England also recognises the authority of the first four councils of the undivided Church. In addition to this, the canon law, so far as it is incorporated in the general law of the land, constitutions, canons of convocation (*ut supra*) are also of authority (see *Escott v. Martin*, 1842, 4 Moo. P. C. 104).

The clergy, as distinguished from the laity, have always been regarded for many purposes as an estate of the realm (see CLERGY), and the Act of Henry VIII. distinguishes between the spirituality and the temporality. In point of view of spiritual capacity, spiritual or ecclesiastical persons are bishops, priests, and deacons; the administrative officers of the Church are archbishops, bishops, deans, archdeacons, rural deans, rectors, vicars (*vide sub titulis*).

Ecclesiastical Property.—The subject of ecclesiastical property is discussed under the headings of Ecclesiastical Corporations, Queen Anne's Bounty, Tithes, and Glebes. It may be generally stated that the Church of England is not a corporate body. Apart from modern endowments, which are often vested in trustees, bishops, deans and chapters, archdeacons, rectors, etc., are corporations, sole or aggregate, as the case may be. The origin of this is traced and explained in Pollock and Maitland's *History of English Law*.

Who are Members of.—It is frequently stated that every English subject is a member of the Church of England; but this statement can hardly be regarded as accurate. Every baptized person, as such, is in a certain degree a member of the Church, and at common law no religious body other than the Church of England was in any way recognised. Dissenters can hold certain minor offices in the Church, as, *e.g.*, that of churchwarden. Jews, however, are not eligible for these offices. On the other hand, Dissenters are not entitled to marriage or burial at the hands of the priests of the

Church unless they have been validly baptized, nor, probably, to receive the communion unless they have been confirmed. Such persons, however, although probably within the condemnation of the canons of 1603, can sue in the ecclesiastical Courts.

• *Who must be Members of.*—The Sovereign and probably a Regent must be a member of the Church of England.

In the event of the Sovereign marrying or becoming a Roman Catholic, he or she forfeits the right to the Crown (Act of Settlement). It is generally held that under the exceptions provided for in the Roman Catholic Relief Act, 1829, 10 Geo. iv. c. 7, the Chancellor of Great Britain, the Lord Keeper, the Lords Commissioners of the Great Seal, and the Lord Lieutenant of Ireland may not be Roman Catholics.

The Anglican Communion Abroad.—For the history of the establishment and organisation of the Church in the colonies, in Canada, India, Africa, and elsewhere, see Phillimore, *Ecclesiastical Law*, 2nd ed., vol. i. 1769.

The status of the Church in the colonies has been defined in several judgments of the Privy Council. In *Long v. The Bishop of Cape Town*, 1863, 1 Moo. P. C. C. N. S. 411, it was said, "The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse, position: and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who have expressly or by implication assented to them." In the case of *In re The Lord Bishop of Natal*, 1864, 3 Moo. P. C. C. N. S. p. 115, at p. 151, it was said, "Although in a Crown colony properly so called, or in cases where the letters patent are made in pursuance of the authority of an Act of Parliament (such, for example, as the Act of the 6th and 7th Vict. c. 13), a bishopric may be constituted and ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet the letters patent of the Crown will not have any such effect or operation in a colony or settlement which is possessed of an independent Legislature"; and see *R. v. Eton College*, 1857, 8 El. & Bl. p. 610, at p. 635; *Bishop of Natal v. Gladstone*, 1866, L. R. 3 Eq. p. 1; *The Bishop of Cape Town v. The Bishop of Natal*, 1869, 6 Moo. P. C. C. N. S. p. 203; *Merriman v. Williams*, 1882, 7 App. Cas. 484.

Relation to the Episcopal Church in Scotland.—While the Church of England and the Scottish Episcopal Church are in full communion, persons admitted into holy orders by bishops in Scotland cannot be admitted to benefices or other ecclesiastical preferment in England without the consent of the bishop of the diocese, and in certain cases a penalty may be imposed on such persons officiating without the consent of the bishop (27 & 28 Vict. c. 94, ss. 5 and 6).

The following are earlier English statutes affecting the Episcopal Church in Scotland:—10 Anne, c. 10, 1711; 1 Geo. I. c. 29, 1718; 19 Geo. II. c. 38; 21 Geo. II. c. 34; 32 Geo. III. c. 63.

• See further, as to the status in England of clergymen of the Scottish Episcopal Church, CANONICAL OBEDIENCE.

It may be mentioned that the Home Office is the medium of official communication between the Church and the Crown.

[*Authorities.*—Giba. Cod.; Ayliffe, *Parergon*; Pollock and Maitland, *Hist. Eng. Law*; Burns, *Ecl. Law*; Phillimore, *Ecl. Law*, 2nd ed.; Anson, *Law and Custom of the Constitution*; Stubbs, *Constitutional History*.]

Church Rates.—See RATES (CHURCH).

Churchwarden.—The office of churchwarden (*les gardiens d'église*, Year Book, 8 Hen. v. f. 4. Hil. pl. 15) probably grew up in the fourteenth century. When the legal theory that the parson was in a certain sense the owner of the church and glebe came into being, it became necessary to find persons who might for legal purposes be treated as the owners or possessors of the chattels of the church, which were provided by the parishioners, and were often very costly. From this necessity arose the common law office of churchwardens, who first were known as proctors, afterwards as guardians of the church, often as wardens of the goods, works, and ornaments of the church, lastly as churchwardens.

As the office of churchwardens sprang up through custom, it is natural that the mode of their election should have differed. They are, however, primarily ecclesiastical, not civil officers, and therefore follow the ecclesiastical divisions of the country.

The Local Government Act of 1894, 56 & 57 Vict. c. 73, s. 5, subs. 2, provides, "As from the appointed day" (*i.e.* April 1895) "the churchwardens of every rural parish shall cease to be overseers, and an additional number of overseers may be appointed to replace the churchwardens; and references in any Act to the churchwardens and overseers shall, as respects any rural parish, except so far as these references relate to the affairs of the church, be construed as a reference to overseers." (As to the legal estate or interest in property vested in churchwardens and overseers prior to the Act, not being property connected with the affairs of the church or an ecclesiastical charity, see s. 5, subs. (2) (c), and s. 6, subs. (1) (b).) Churchwardens continue, however, overseers in urban parishes (see, however, Local Government Act, 1894, s. 33).

In 1603 the position of churchwardens was regulated by canons passed in Convocation, which received the Royal assent. As these canons, however, have never received the sanction of Parliament, they cannot bind the laity *proprio vigore*, but only so far as they are declaratory of the ancient usage and law of the Church of England. Canon 89 provides that the choice of churchwardens shall be made by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another; and without such a joint or several choice, none shall take on them to be churchwardens; and that churchwardens shall hold office for a year only. Canon 90 provides that the churchwarden shall be chosen each year the first week after Easter; but this is only directory. As a matter of fact, the minister generally nominates one churchwarden and the parishioners the other.

For reasons above stated, these canons cannot overfide custom, and by custom in most of the old London parishes the parishioners choose both churchwardens; but in new London parishes the canon holds. And there may also be a good custom for the election to be by a select vestry or by the lord of the manor, or by the old churchwardens. And in many larger parishes, especially in the North of England, which are divided into several districts, townships, or tithings, there may be a custom to elect church or chapel wardens to act separately for the district, for which each is appointed, but such churchwardens when elected represent the whole parish (*R. v. Marsh*, 1836, 5 Ad. & E. 468). But a custom to have no churchwardens is bad, and the Court will grant a mandamus to the inhabitants of a parish liable to contribute to church rates to assemble together with the minister and elect churchwardens, and, in case of disobedience, may grant a criminal information against the inhabitants upon whom the writ is served (*R. v. Wise*, 1831, 2 Barn. & Adol. 197).

A custom for the minister to appoint both churchwardens is also bad. At common law churchwardens were elected yearly by the minister, and parishioners paying scot and lot, in vestry assembled. Election by the vestry still continues, but the constitution of the vestry has been modified by various Acts of Parliament, and in many parishes by custom or statute the election is by select vestries (as to which, see VESTRY).

Apart from common law, there are also statutory, churchwardens who hold their offices, and whose duties are mainly regulated, under modern statutes passed to facilitate the building of churches and the formation of new parishes, viz.: the Church Building Acts, 58 Geo. III. c. 45, ss. 73 and 74, 1818; 59 Geo. III. c. 134, s. 30, 1819; 1 & 2 Will. IV. c. 38, ss. 16 and 23, 1831; and 8 & 9 Vict. c. 70, ss. 6, 7, 1845; also by the New Parishes Act, 1843, 6 & 7 Vict. c. 37, s. 17, amended by the New Parishes Act, 1844, 7 & 8 Vict. c. 94, and the New Parishes Act, 1856, 19 & 20 Vict. c. 104, s. 35.

Churchwardens appointed under these Acts are not parochial officers nor overseers of the poor in their parish; but when under 1 & 2 Will. IV. c. 38 a chapel-of-ease with its district is for ecclesiastical purposes constituted a separate parish church, it is provided that churchwardens appointed under that Act shall perform all the ecclesiastical duties of churchwardens; and a similar provision is made by the New Parishes Act, 1843, with regard to new parishes formed under it.

These Acts provide for the election of churchwardens. It may be generally stated that, under these, two churchwardens are elected at the usual term of choosing parish officers, and that one is appointed by the incumbent and the other by the inhabitants residing in the district or new parish (on this point see VESTRY PARISH; NEW PARISH). Under 1 & 2 Will. IV. c. 38, s. 16, and 8 & 9 Vict. c. 70, s. 6, which relate to district chapelries, one churchwarden is to be chosen by the minister and the other by the pew-renters or householders resident in the district chapelry.

All inhabitants of a parish, being householders, but not lodgers, are properly qualified to serve the office of churchwarden, apparently without distinction of sex (*R. v. Stubbs*, 1788, 2 T. R. 395), but according to the old authorities no outsetter or outlier who occupieth lands in the parish is capable of being chosen (Dean Pridcaux, *Directions to Churchwardens*, p. 44; Gibson, p. 215). But it has been held that the partner in a London house of business who personally attends to the business is liable to be chosen (*Stephenson v. Langston*, 1804, 1 Hag. 379). But the Courts do not seem inclined to extend this exception, and the recent decisions would make the restriction apply to churchwardens of district parishes under 1 & 2 Will. IV. c. 38, s. 16, although the words in the Act (s. 16) are only "fit and proper persons" (see *R. v. Harding*, 1889, 6 T. L. R. 53; *R. v. Cree*, 1892, 67 L. T. 556), the idea being that a churchwarden's duties require knowledge of the parish.

It would seem, apart from these modern decisions, that all that is really required at common law is that a churchwarden should have some residence or place of business in a parish where he can be found. A strict insistence on residence certainly causes great inconvenience. Certain persons are disqualified from serving the office; aliens, denizens, children, persons who have been convicted of fraud and perjury, and Jews. Certain other classes, though not disqualified, are exempt, except by their choice. These include peers of the realm, members of Parliament, clergymen, sheriffs, barristers, solicitors, practising physicians, Roman Catholic clergymen (but as to them, see 31 Geo. III. c. 23, s. 852; Geo. III. c. 155), duly qualified Dissenting preachers and teachers, certain civil servants, and other professional men (as to these,

see Prideaux, *Churchwardens' Guide*, pp. 12–15). Protestant Dissenters and Roman Catholics may, if they have scruples, perform the office by deputy, and in spite of this the Courts will not oblige a Dissenter to serve the office, the tenets of whose sect are such (*e.g.* if he be a Quaker) that he cannot be presumed to be able conscientiously to perform the duties (*Adley v. Theobald*, 1836, 1 Curt. 447).

Churchwardens under the Act 1 & 2 Will. iv. c. 38 must be fit and proper persons chosen out of the inhabitants of such parish, and members of the Church of England. The same qualification applies to churchwardens of new parishes under 6 & 7 Vict. c. 37, only that it is not stated that they must be inhabitants of such new parish. Churchwardens, under the Church Building Acts, must be "fit and proper persons," but need not be members of the Church of England.

Churchwardens of separate parishes for ecclesiastical purposes of district parishes and new parishes must, as above stated, be resident householders (*R. v. Harding, supra*), but it is not clear if this applies to the churchwardens of district chapelries and consolidated chapelries, churches without districts, or subscription churches and chapels under the Church Building Acts. (See Prideaux, pp. 18, 19.)

In the event of the persons entitled refusing to elect, or of a *prima facie* case of an improper election, the remedy is to apply to the Queen's Bench for a mandamus; but such application must be made promptly, and a rule will not be granted when an election has taken place *de facto*, unless the proceedings have been null and void, or there is probable reason to suppose that the result would have been different (*R. v. Birmingham (Rector)*, 1837, 7 Ad. & E. 254; *Ex parte Mawby*, 1854, 3 El. & Bl. 178; Prideaux, p. 38).

The election of churchwardens is first by show of hands, and afterwards by polling. (See VESTRY.) A curate stands in the place of the parson for the purpose of nominating one churchwarden. A vestry may excuse a person elected from serving the office, and in such cases it has a discretion to take a fine from the person so excused.

After election the churchwarden has to subscribe before the archdeacon or other proper ordinary a declaration that he will faithfully and diligently perform the duties of his office. The usual course is for the old churchwardens to present the new churchwardens to the ordinary to be admitted; but this is not necessary in point of law. Churchwardens ought, however, not to act before they have been admitted and made the declaration, and the old churchwardens "shall be reputed hereafter to continue until the new churchwardens that shall succeed them be sworn, which shall be the first week after Easter" (see *ante*), "or some week following, according to the declaration of the ordinary" (canons of 1603, and see also 5 & 6 Will. iv. c. 62, s. 9). To what extent the acts of a churchwarden before admission may be supported as the acts of an officer *de facto* is doubtful (see Prideaux, p. 43). A person elected and refusing to take the office or make the declaration may, under 53 Geo. III. c. 127, be taken under a writ *de contumacie capiendo*, which writ issues out of Chancery upon a significavit from the ecclesiastical Courts. An old churchwarden, if re-elected, should be readmitted (see, however, *Bray v. Somer*, 1862, 2 B. & S. 374), but cannot be compelled to serve.

The office of the ordinary is ministerial only, and if a colourable title is shown by the persons claiming to be churchwardens, he is bound to admit them, even if there are two claimants for the office, as in such case he should admit both, and if he refuse he can be compelled by a mandamus (*R. v. Archdeacon of Middlesex*, 1835, 3 Ad. & E. 615); but though the ordinary

may not exercise any judicial authority, he may inquire whether the person claiming to be admitted has been duly elected, and if the parish return a disqualified person he is bound to reject him (*Anthony v. Seyer*, 1789, 1 Hag. Con. 9; *R. v. Williams*, 1828, 8 Barn. & Cress. 681).

• A fee is payable on admission to the officials of the ordinary, but the churchwardens cannot be forced to pay it out of their own pockets (*Veley v. Pertwee*, 1870, L. R. 5 Q. B. 573).

A churchwarden who ceases to reside in the parish does not *ipso facto* cease to be a churchwarden, but another should be appointed in his place (*Ganvill v. Utting*, 1845, 9 Jur. 1081).

As to the civil duties of churchwardens, see OVERSEER. (See also the article on ALLOTMENTS.)

Churchwardens are in a certain sense a body of the nature of a corporation. But they are so only with regard to the goods and chattels of the church, so that they may purchase the same for the parish, or sue and be sued in respect of the same; though they cannot dispose of them without the consent of the parish and the licence of the ordinary; but they are not a corporation in such sort as to purchase land or take by grant except in London, where they are also a corporation for such purposes. Goods placed in the church are not church property, unless there is evidence of some dedication. But if the churchwardens dispose of goods, the parishioners cannot bring an action against them or the receivers of such goods; but such action must be brought by the new churchwardens. One churchwarden cannot give an effectual release or dispose of the goods of the church. Churchwardens in their public capacity have no right to delegate their functions, but if they appoint an agent whom they afterwards sue in their private capacity for a wrongful act, the sanction of one of them will be a good defence to an action by both.

With the consent of the parishioners, however, churchwardens jointly can dispose of the goods of the church (*Methold v. Wynn*, 1 Rol. Abr. 393; *Martin v. Nutkin*, 1724, 2 P. Wms. 268, is hardly an authority for the statement that churchwardens can dispose of goods without the consent of the parish).

Under canon 85 the churchwardens are directed to keep the church repaired, and all things therein in an orderly and decent sort. But since the Abolition of Church Rates Act there is no means of compelling the parish to make such provision (see *post*). It is their duty to provide bread and wine for the communion service (see RUBRIC), a chalice (see COMMUNION), a font (see FONT), a convenient seat for the minister to read the service in, a pulpit (see PULPIT), a surplice (see VESTMENTS), a Bible of the largest volume, a book of the Homilies (canon 80), an alms-chest (see ALMS), a bier for the dead, a bell and rope, a register book of christenings, weddings, and burials (canon 70), a chest for the register, a vestry book, etc.

With regard to church repairs, it is the duty of the churchwardens, after taking an estimate as to the necessary costs of the same, and ascertaining how much money they have in hand, to convene a vestry and submit the proposed repairs to them in order that, if necessary, a rate may be imposed. (See RATES (CHURCH).) Even if the churchwardens have sufficient funds in hand, important repairs should not be effected without the sanction of a vestry. (See VESTRY.)

As to the duties of the churchwardens with regard to the repair of the body of the church, see NAVE; as to the chancel, see CHANCEL. See also RATES (CHURCH); with regard to burial and closed graveyards, see CHURCHYARD.

In the event of an avoidance of the benefice by death or other causes, the churchwardens are the proper persons to have the care of the benefice.

(As to their duties, see INCUMBENT ; SEQUESTRATION.) They are at liberty in such an event to apply to the chancellor of the diocese for sequestration, and being authorised by an instrument under the seal of the office are to manage the profits and expenses for the benefit of the successor, and are afterwards bound to account to such successor; and the ordinary has power by citation to compel them to undertake the charge under penalty of contumacy. The ordinary has also the power to appoint other persons than the churchwardens to act as sequestrators.

Churchwardens, for the purposes of their duties, ought at all times to have free access to the church; but the minister has in the first instance the right to the possession of the key thereof, and it is irregular for the churchwardens to make a key for themselves. If the minister refuses them access to the church on proper occasions, complaint should be made to the ordinary (*Lee v. Matthews*, 1830, 3 Hag. Ec. p. 167, at p. 173; *Dowdney v. Good*, 1861, 7 Jur. N. S. 637). The churchwardens have no right to set up monuments in the church without the consent of the minister or ordinary; for such right, if admitted, would secularise the church (*Beckwith v. Harding*, 1818, 1 Barn. & Ald. 508; 19 R. R. 372); nor may they remove fixtures, monuments, or pictures; but if these are offensive or cause inconvenience they should apply to the ordinary for a faculty (*q.v.*) authorising their removal; and they have no right to remove by force any ornament introduced by the minister although without a faculty. Their proper course is to cite the minister to show why a faculty should not be granted for the removal.

The churchwardens have a duty to preserve order during divine service, and to see that everyone takes his proper seat, though their rights in these matters are far from being clearly ascertainable (*Asher v. Culcraft*, 1887, 18 Q. B. D. 607; *Fuller v. Lane*, 1825, 2 Add. E. R. 419; as to the law as to seats in church generally, see PEWS; also CHANCEL); but they can have no prescription to dispose of the seats independently of the ordinary (*Presgrave v. The Churchwardens of Shrewsbury*, 3 Ann, 1 Salk. 167; *May v. Gilbert*, 11 Jac. 1; 2 Bulst. 151); and they have no right to refuse anyone, behaving properly, standing-room in the church, because they think that he cannot be conveniently accommodated (*Taylor v. Timson*, 1888, 20 Q. B. D. 671). They are not to suffer loiterers about the church or churchyard during divine service (canon 19), and they shall present the names of those who behave rudely and disorderly in church at visitations (canon 111). (See further BRAWLING ; CHASTISEMENT.)

A churchwarden may take the hat off the head of one who sits covered during divine service (*Hall v. Planner*, 18 Car. 2, 196). Churchwardens have a general duty to protect the church and churchyard from any irreverent or unseemly conduct even when divine service is not being performed (*e.g.* to prevent plays, banquets, etc., in the church or churchyard, see canon 88); but it is doubtful how far they have a right to expel a person from the church or churchyard for misconduct when no service is going on (compare *Worth v. Terrington*, 1845, 3 Mee. & W. 781; *Griffin v. Deighton*; *Taylor v. Timson*, *supra*).

Churchwardens have a right to prevent any man from preaching in the church unless he shows his licence (canon 51), and they should note the names of strange preachers in a book (canon 52); and it seems that if the minister himself were guilty of grossly offensive conduct, they would have the right to restrain him. Their only other function is to collect the alms during the reading of the offertory sentences at the communion service, and alms so collected are at the disposal for distribution of the minister

and churchwardens (see further OFFERTORY) (*Hutchins v. Denziloe*, 1792, 1 Hag. Con. 170). If churchwardens think it necessary to remove a person from the church, they should do so without unnecessary force and without giving occasion for scandal (*Reynolds v. Monkton*, 1841, 2 Moo. & R. 384).

With regard to free seats, churchwardens have authority to direct, for the maintenance of order and decorum, in which of such seats certain classes of the congregation may and may not sit (*Asher v. Culcraft*, 1887, 18 Q. B. D. 607). It is an ecclesiastical offence for churchwardens to break into the belfry and ring the church bells against the consent of the incumbent; but such proceedings will not be justified if they were merely rung without his consent.

As guardians of the morals and religion of the parish, churchwardens (in their character of questmen) are bound to present, twice a year, according to the articles supplied to them at their admission, offences (including offences against morality) in their parish punishable by ecclesiastical law, before the archdeacon or other ordinary, and they may present oftener, but cannot be compelled so to do unless the bishop himself visits (canons 116, 117). The minister himself may be so presented.

It may be noted that this part of the churchwarden's duties is largely obsolete, but it has been considered, by Stephen, J. (*obiter*), that persons (other than Protestant Dissenters usually attending a dissenting place of worship) absent from church "may still be presented" (*Taylor v. Timson*, *supra*). See further, article PRESENTATION. A churchwarden may also, under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8, make a written representation to the bishop of any illegal practice on the part of the minister.

Under 23 & 24 Vict. c. 51, churchwardens are compelled to make an annual return, in the month of June, of sums levied or received for church rates to one of the Secretaries of State.

Churchwardens, at the end of their year or within a month's time thereof, must pass their accounts before the vestry. Exceptions may be taken to such accounts, first, as to the particulars on which disbursements have been made, and, secondly, as to the justness of the disbursements. If the disbursements exceed the balance in hand, and have been sanctioned by the parish, they may be paid by the succeeding churchwardens. If churchwardens have disposed of church goods without the consent of the ordinary, although with the consent of the parishioners, the ordinary may call on them to account. Churchwardens are at present compellable by the ecclesiastical Courts to produce their accounts; but no examination of them can take place before that jurisdiction, nor can their production be compelled if they have been passed by the vestry.

When churchwardens have presented their successors, they are *functi officio*, and their successors may continue an action which they have commenced.

A churchwarden who misbehaves may be removed on a complaint to the ordinary, and may be sued for neglect of duty in the ecclesiastical Courts; and if, as a churchwarden, he receives money corruptly, he may be indicted (*Welcome v. Luke*, 18 Car. 2: 1 Sid. 281; *R. v. Eyres*, 18 Car. 2: 1 Sid. 307). See SIDESMAN.

*[*Authorities*.—Lindwood, *Prov.*; Gibson, *Cod.*; Ayliffe, *Parergon*; Dean Prideaux on *Churchwardens*; Rogers, *Ecclesiastical Law*; Prideaux, *Churchwardens' Guide*, 16th ed.; Shaw, *Parish Law*; Steer, *Parish Law*; Pollock and Maitland, *History of English Law*.]

Churchyard.—The freehold of the churchyard is in the incumbent, subject to the parishioners' right of burial. The incumbent and the churchwardens are bound to allow the burial of a parishioner in the churchyard, but they have a discretion as to the particular part where the burial shall take place (*Ex parte Blackmore*, 1830, 1 Barn. & Adol. 122). *There may be a custom in a parish to allow the burial of strangers as well as parishioners in the churchyard; but if no such custom exists, it has been laid down in several cases that the incumbent and churchwardens should grant provision for the burial of strangers very sparingly, so that the rights of parishioners may not be prejudicially affected. The duty of seeing that the churchyard is well kept and repaired rests with the churchwardens (*q.v.*).

When a churchyard is once consecrated and dedicated to sacred purposes, no judge has power to grant a faculty to sanction the use of it for secular purposes; nothing short of an Act of Parliament can divest consecrated ground of its sacred character (*R. v. Twiss*, 1869, L. R. 4 Q. B. 407); but under the various Open Spaces Acts many disused churchyards and burial grounds have been secularised and converted into recreation grounds.

[See Phillimore, *Ecclesiastical Law*, 2nd ed., vol. ii. pp. 1383 *et seq.*] See BURIAL GROUND; CEMETERY.

Cider (or Cyder).—A fermented drink made from apples.

It was under 12 Chas. II. c. 24, ss. 14, 16–18, 24, subject to the hereditary duties of excise, which are now suspended during the continuance of the Royal civil list (1 & 2 Vict. c. 2, s. 7).

For purposes of excise and licences for sale of intoxicants it is treated in the same way as beer (*q.v.*), and a licence to sell beer covers the sale of cider (1 Will. IV. c. 64, s. 32 (retail); 32 & 33 Vict. c. 57, s. 2; 43 & 44 Vict. c. 20, s. 40). Its sale without a licence by retail in quantities of less than 4½ gallons at a time for consumption off the premises is punishable under 4 & 5 Will. IV. c. 85, ss. 17, 18. The cost of the excise licence for sale of cider is 25s. (1 Will. IV. c. 64, s. 30; 43 & 44 Vict. c. 20, s. 41).

Under secs. 11 and 18 of the Spirits Act, 1880, 43 & 44 Vict. c. 24, it is unlawful for a distiller or rectifier of spirits to make cider at his distillery or to carry on his spirit business on premises adjoining a place where cider is made.

Cinque Ports.—The Cinque Ports are a number of seaport towns on the coast of Kent and Sussex, which in very early times were "the five most important havens in the kingdom" (Comyn, *Digest, Franchise*), owing to their position at the nearest part of England to the Continent; they were "privileged corporations with peculiar customs and great local independence" (Stubbs, *Const. Hist.* ii. 314); and formed a franchise or liberty subject to the jurisdiction of their warden only and his officers. They were enfranchised by Edward the Confessor, and had their charter of confirmation from Edward I. in 1278. "In the time of Edward the Confessor there were but three ports—Dover, Sandwich, and Romney; but in the time of William the Conqueror, Hastings and Hythe were added; and John, Winchelsea and Rye—yet they are called the Cinque Ports" (Comyn, *ibid.*, quoting 4 Inst. 222). In the statutes they are always spoken of as "the Cinque Ports, two ancient towns and their members." In Domesday Book, Dover and Sandwich are recorded as holding their

liberties in return for a provision of twenty ships each,* to be kept for fifteen days annually in the king's service; and Romney with the other ports owed sea service (Stubbs, i. 665). The Cinque Ports are closely connected with the first beginnings of a regular navy in England; in the reign of Henry III. when ships were required, the necessary number was impressed by the sheriffs of the maritime counties or the barons of the Cinque Ports, by the latter notably in 1207, and so again in 1298 under Edward I. (*ibid.* ii. 311). In the early years of Edward I.'s reign they exercised the chief administrative power over the navy; thus in 1298 Robert Burghersh, the lieutenant warden of the Cinque Ports, superintended the fleet; and in 1302 he was still warden, and answerable for the service of fifty-seven ships due from the ports. In 1306, when the maritime jurisdiction over the English coasts was divided between three admirals (see ADMIRAL), one was captain and admiral of the fleet of the ships of the Cinque Ports and all other ports from Dover to Cornwall, while another was captain and admiral from the Thames to Berwick, and the third probably commanded on the coast of the Irish Sea (Stubbs, ii. 313). Under Edward III. the Cinque Ports furnished fifty-seven ships to the royal fleet, Dover and Hastings contributing twenty-one each, and Romney, Hythe, and Sandwich five each (*ibid.* i. 667).

The lord warden is described by Comyn as "an officer who has been appointed time out of mind for the custody of the ports, and as having the jurisdiction of the admiral within the Cinque Ports exempt from the Admiralty of England, which jurisdiction is saved to him in several Acts of Parliament" (*Digest, Franchise*). Jeakes gives the following account of him: "This great officer, or *Limenarcha*, as Camden observes, was an imitation of the same officer which the Romans established for the defence of our coasts, and called *Littoris Saxonici*, or *Tractus Maritimi Comes*, who had the charge of nine seaports. There is no doubt that these Cinque Ports and towns were under one special government in the time of the Saxons, necessity so requiring, though *guardian* (from whence *warden*) imports a name imposed by William the Conqueror. These wardens being for the defence of the ports and coasts on which they are, and as chief commanders of the ships which they were to furnish for sea, gave them as well the name of admirals in respect of their office as to the sea; as wardens with reference to their care in keeping and preserving the liberties of the ports as land, both as mediators between their sovereigns and them, if differences should arise there, and as judges among them and between them and others to guard and defend them against . . . encroachments of foreigners upon their rights and jurisdictions. For as to the former he is the immediate officer of the king to the ports, and hath the return of his writs that run there, they being directed to him; and as to the latter the causes were heard and judgment concerning them given in the old Court of Shepway and the Courts of Chancery and Admiralty. . . . That the warden might have a place of residence near the ports, and a seat suitable to his quality, is the Castle of Dover committed to his charge and custody, of which he is also entitled the constable" (*Charters of the Cinque Ports*, published 1728, but written forty years before).

The lord warden's exclusive civil jurisdiction in the Cinque Ports was abolished in 1855 (18 & 19 Vict. c. 48, s. 2), except as regards his Court of Admiralty (*ibid.* s. 10, and 1 & 2 Geo. IV. c. 76, ss. 15 and 18, 1821, and M. S. A., 1894, s. 571), and his jurisdiction and office as admiral of the Cinque Ports (Municipal Corporations Act, 1882, s. 256). An instance of his right to droits of admiralty in the Cinque Ports being

made good against the Lord High Admiral is to be found in the case of *Lord Warden v. King in his office of Admiralty* (1831, 3 Hag. 438—a whale stranded at Dover); though he was not entitled to prize droits (*The Oester Ems*, 1784, 1 Rob. C. 284; Browne, *Admiralty*, ii. 470). For militia purposes he acts for the Cinque Ports as the lord lieutenant of a county. He at one time claimed a right to nominate and recommend to the ports persons to represent them in Parliament; and Comyn says that the ports held their franchise *per baronium*, and were represented in Parliament by the lord warden or keeper; but this right was declared not to exist in 1688 (1 W. & M. s. 7). He or his deputy may be a member of the Admiralty Commission instituted by 28 Hen. VIII. c. 15 to try all offences committed by sea within the jurisdiction of the Lord High Admiral or his own; and for all offences within the Cinque Ports the Commission was directed to him, and trial was had before a jury of the inhabitants (1 & 2 Geo. IV. c. 76, s. 16). The powers of these Admiralty Commissioners are now exercised by the judges of assize (1844, 7 & 8 Vict. c. 2), and the Central Criminal Court (*q.v.*) can try all offences at sea in the jurisdiction of the Admiralty (1834, 4 & 5 Will. IV. c. 36). The office is one of great honour even at the present day; and was held by Edward I. in the lifetime of his father Henry III., and in later times by Mr. Pitt in the time of the American War, by the Duke of Wellington, Lord Palmerston, and Lord Salisbury; and it entitles its holder to a salute of nineteen guns from ships of war.

The Cinque Ports have been represented in Parliament from the time of boroughs first sending representatives, viz. the famous Parliament of Simon de Montfort in 1265, the writ then summoning “de quinque Portubus de qualibet civitate et burgo quatuor homines,” and from 42 Edward III. they returned two members (*Encycl. Metrop.* “Cinque Ports”). In Cromwell’s time, in 1656, Sandwich, Dover, and Rye each sent a baron to Parliament. In 1832 Winchelsea was disfranchised as a borough; as were Romney, Rye, and Sandwich in 1885; but Dover, Hastings, and Hythe are still separately represented.

The privileges of the barons or freemen of the Cinque Ports were at one time of a high nature, and thus they still have the right at the coronations of the kings of England to carry a silken canopy over the sovereign’s person, and sit on his right hand at the coronation banquet in Westminster Hall (see Shakespeare, *Henry VIII.* Act iv. Scene 1). But the most important of their privileges was their exemption from any other jurisdiction than that of their own Courts. Their last charter, granted in the twentieth year of Charles II., and confirmed in the fourth of James II., only confirms that of Edward I. granting “the barons of the Cinque Ports the liberties and freedoms as they and their ancestors then at any time, better, more fully, and more honourably have had in the times of King Edward (the Confessor), *inter alia* to be free of common summons before our justices from all manner of pleas itinerant (*i.e.* judges of assize) in whatsoever counties such their lands be so that they be not bound to come before the justices aforesaid, except any of the same barons implead any or be impleaded” (Jeakes, 22). These liberties were confirmed by Magna Charta of Edward I. (s. 9); and only prerogative writs of the sovereign such as mandamus, habeas corpus, etc., ran to the Cinque Ports (Comyn, *ante*). Their old organisation continues for some purposes: all of them except Winchelsea and Romney have separate borough jurisdictions saved to them (Municipal Corporations Act, 1882, s. 248), and power was given to grant a charter to Romney and Winchelsea, with a provision in the case of the latter that

if no charter were granted the corporation should continue undissolved, and Winchelsea still be entitled an ancient town of the Cinque Ports (Municipal Corporations Act, 1883, ss. 14 and 15 and schedule I. (1)); but their non-corporate members became part of the body of the county in which they were situate (s. 13 (3)). The Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 48 (4), makes "the Cinque Ports two ancient towns, and their members for all purposes of the county council and powers and duties of Quarter Sessions and justices out of sessions form part of the county in which they are situated, without prejudice nevertheless to the position of any such port, town, or members as a Quarter Sessions borough under the Municipal Corporations Act, 1882, as amended by this Act, and without prejudice to the existing privileges of such ports, towns, and members as respects matters not affected by this Act." The ports have had a militia of their own since 1673 (15 Car. II. c. 4, s. 10), and the present Militia Act applies to them as if they were a separate county and the lord warden were the lieutenant of that county (45 & 46 Vict. c. 49, s. 49 (3)); and the enactments with regard to local militia continue in force (s. 54 (1), schedule 3). They have a separate corps of volunteers of their own, and for the purposes of the Volunteer Acts are equivalent to a county (1863, 26 & 27 Vict. c. 65, and 1871, 34 & 35 Vict. c. 86).

The Admiralty Court of the Cinque Ports, whose jurisdiction is saved expressly by statute (1 & 2 Geo. IV. c. 76; 46 & 47 Vict. c. 18, s. 13; and 57 & 58 Vict. c. 60, s. 571), exercises a jurisdiction which is "in practice confined to cases arising within the liberties and jurisdiction of the Cinque Ports, and except in the case of salvage under 1 & 2 Geo. IV. c. 86, and of admiralty and maritime causes transferred thither from the County Courts, does not extend beyond the inherent jurisdiction possessed by the High Court of Admiralty" (Williams and Bruce, *Admiralty Practice*, 20). The local limits of that jurisdiction were declared at an inquisition held at the Court of Admiralty in Dover in 1684 to extend from Shore Beacon in Essex to Red Cliff near Seaford; and with regard to salvage they are defined as comprising all the sea between Seaford in Sussex and a point within five miles of Cape Grisnez on the coast of France, and the coast of Essex (1 & 2 Geo. IV. c. 76, s. 18). Within these limits the Court takes cognisance of causes of damage to ships (*The Vivid*, 1873, 1 Asp. 601) and salvage (*The Clariss*, 1856, Swa. 129; *The Antelope*, 1872, 1 Asp. 477), though the Admiralty Court has a concurrent jurisdiction there (*The Maria Luisa*, 1856, Swa. 67; *The Jeune Paul*, 1866, L. R. 1 Ad. & Ec. 336); and other maritime causes, such as wages, etc. (Williams and Bruce, 203). Actions may be transferred or appeals made to it from the County Courts (1868, 31 & 32 Vict. c. 71, s. 33); and it can hear appeals from the Cinque Ports Salvage Commissioners (1 & 2 Geo. IV. c. 76, s. 4), such appeal being final (s. 5). The appeal from it lies to the Privy Council (*The Clariss*, ante). The Court still sits as formerly in the church of St. James at Dover, though by consent of parties it sometimes sits in London or elsewhere. The Cinque Ports Salvage Commissioners are a body consisting of three or more substantial persons in each of the Cinque Ports, the two ancient towns, and their members appointed by the lord warden, who have power to determine disputes as to salvage and all claims and demands by pilots, hovellers, boatmen, and other persons for any services rendered to any ship or vessel, as well as for carrying off to such ship or vessel any anchors, cables, or other stores from any part or port on the coast of Kent, Sussex, Essex or the Isle of Thanet, as well as for conducting and conveying such

ships or vessels from the Downs or any other harbour, port, or place on the said coasts within their jurisdiction, or for the saving and preserving within that jurisdiction any goods or merchandise wrecked, stranded, or cast away from any ship or vessel, and the masters and owners thereof being present at the place where the commissioners are sitting, to hear and determine all cases of services rendered by pilots, boatmen, or others to shipping within their jurisdiction, whether such ships or vessels shall be in distress or not, and to examine the parties and their witnesses on oath (for an instance of a salvage award by them, see *The Elise*, 1859, Swa. 436); such commissioners are to be paid by the owners of the goods or vessels such fees as the lord warden shall allow; no commissioner is to act away from the place where he is resident; an appeal lies from their decision either to the Cinque Ports Admiralty Court or to the Admiralty Court (*The Gloria de Maria*, 1856, Swa. 106), within twenty days, and such appeal is to be final (1 & 2 Geo. iv. c. 76, ss. 1, 2, 3, 4, 5, 1821). Such appeal to the Admiralty Court is in the nature of a rehearing; and thus new evidence may be given by the appellants, and the value of the salvaged property may be re-opened, though it has been agreed before the commissioners (*The Annette*, 1873, 1 Asp. 571). It seems that in such a case an appeal will lie by leave from the decision of a Divisional Court of Admiralty (which takes the place of the Admiralty Court for this purpose) to the Court of Appeal (Judicature Act, 1873, s. 45, not overridden by Judicature Act, 1876, s. 20; *Thomas v. Kelly*, 1888, 13 App. Cas. 508). A similar jurisdiction is enjoyed by the lord warden, the lieutenant of Dover Castle, the deputy warden, and the judge of the Cinque Ports Admiralty Court, and any other officer especially appointed by the lord warden (s. 15) or the deputy warden (9 Geo. iv. c. 37, 1829). The pilotage authority formerly exercised by the Cinque Ports has been vested in the Trinity House since 1853 (16 & 17 Vict. c. 129) as well as the property of the Society of Cinque Ports, Pilots, and the Court of Loadmanage (ss. 9, 10). All authority over wreck within the Cinque Ports was vested in the Board of Trade in 1854 (17 & 18 Vict. c. 120, s. 11), when the serjeants of admiralty of the Cinque Ports were put under the Board.

[See Jeakes, *Charters of the Cinque Ports*, 1728; Boys, *Sandwich and Cinque Ports*, 1792; Lyon, *Cinque Ports*, 1813; *Encyclopædia Metropolitana*, "Cinque Ports"; Knocker, *Grand Court of Shepway*, 1862.]

Circuits and Assizes.—*Magna Carta*—*Special Justiciaries*—*The Establishment of Circuits*—*Nisi Prius*—*The Commissions*—*The Central Criminal Court*—*The Supreme Court of Judicature Act, 1873*—*The Old Circuits*—*The New Circuits*—*The Dates of Circuits*—*Interpretation.*

Magna Carta.

In the thirteenth century a large part of the judicial business of the country was transacted by justices in eyre, that is by judges having a commission to traverse the country, and hear *all* pleas. (See EYRE.) These *itineræ* or eyres seem, in early times, to have been called assizes; for in the writ ordering the sheriff to summon those who ought to come before the justices in eyre, we find the words, *postquam assisa ultimo fuit in partibus illis*; and similar expressions, which clearly refer to the eyres, are found in other writs of the reign of Henry III. One of the most important functions of justices in eyre was to take Petty Assizes (*q.v.*) which were an exceedingly convenient and expeditious remedy for loss of possession or seisin. But the eyres were, in theory, though not in actual

practice, held but once in seven years; and unless the plaintiff was willing to wait until the justices came into his county to hear all pleas, he was obliged to bring his action in the King's Court, which, before 1215, was not held in any fixed place. To put an end to this inconvenience, the *Magna Carta* of 1215 declared that three of the petty assizes, namely, Darein Presentment, Mortdancer, and Novel Disseisin should always be taken in their counties, that is in the counties in which the lands in dispute were situate; and that two justices should be sent to each county four times a year, who, with four knights chosen by the county, should take such assizes. The *Magna Carta* of the following year contained the same provision, but a different one was inserted in its place in the issues of 1217 and 1225. It was to the effect that only the assizes of Novel Disseisin and Mortdancer were always to be taken in their counties; that justices should be sent to each county once a year, who, with the knights of the county (no number is specified), should take such assizes: that those which could not be terminated by the justices in the county might be terminated by them elsewhere; and that all difficulties were to be adjourned to the bench. Assizes of Darein Presentment were always to be taken in the bench. See also GRAND ASSIZE.

Special Justiciaries.

The provision that assizes of Novel Disseisin and Mortdancer should always be taken in their counties seems to have been loyally observed; but justices were not sent into the counties in the manner suggested by the Great Charter. What happened was this. When any one wanted to avail himself of the remedy by assize, he applied to the king for a justice to be sent into his county to take the assize, and the king then assigned a justice by letters-patents for that purpose. No judges were sent into the counties to take all the assizes which might be brought before them, but special commissions were granted to judges to take particular assizes. This was taken to be a sufficient compliance with the provision of *Magna Carta*. In the early years of the reign of Henry III. there were not many of such commissions; but towards its close, their numbers, in any year, might be counted, not by tens, but by hundreds.

In the forty-fourth year of Henry III., probably because the king had been appointing his favourites, who were not competent to do the work of taking assizes, it was provided that *speciales justiciarie* should be intrusted to seven named persons only, all of whom seem to have been judges of the bench at Westminster, or judges *coram Rege* (*Bracton's Note Book*, i. 20). The Close Rolls do not show that any similar provision was made in the following year, but there was one in 53 Hen. III., and it is possible that others were made in the intervening years, and not recorded upon the rolls.

The system of *speciales justiciarie* was not confined to the petty assizes. Justices were also sent into the counties to take a particular attain, to deliver a particular gaol, and for various other judicial purposes.

The Establishment of Circuits.

It would seem that even in the early part of the reign of Henry III. there was some organisation in the assignment of justices in this way. There would be allotted to one of them the task of taking assizes in some definite part of the country, generally in the neighbourhood of his home; but it was not until the close of the reign that it became common for a judge to be specially appointed to take *all* the assizes, or deliver *all* the gaols in a group of counties. In the first year of Edward I., however, it was found that some further organisation in this direction was necessary. Accordingly, it was

then provided that the country should be divided into six groups of counties, and that two judges should go through each group to take *assisas jyratas et recogniciones*. The work was to be done by the two judges together, or by one of them associating to himself such other persons as he thought fit for the purpose. The provision, which was called *Nova forma de ordinacione justiciariorum* (or perhaps *justiciariarum*), is found on the Patent Roll of 1 Edw. I., and may be said to give birth to the circuits of justices of assize.

In the following year judges were again sent through groups of counties for the same purposes; and although the Patent and Close Rolls do not contain a record of their appointments, it is probable that the system was continued until 13 Edw. I.

In that year the Statute of Westminster, ii. c. 30, ordained that two sworn justices should be assigned, before whom and none others assizes of Novel Disseisin, Mortdancer, and Attaint should be taken. They were to associate to themselves one or more of the discreetest knights of the county into which they should come; and they were to take the assizes and attaints three times a year, at most, during certain weeks named in the Statute. Eight years later, by the Statute of 21 Edw. I., called *De Justiciariis assignatis*, the kingdom was divided into four circuits, and to each circuit there were assigned two justices for taking assizes, juries, and certificates. These justices were to be engaged at this work throughout the year in the places which they thought best, and for the greatest advantage of the people. Though the number of circuits was thus fixed at four, it was afterwards changed to six; but the change does not seem to have been the result of any legislative Act. The Statute of Fines (27 Edw. I. c. 3) imposed on these justices the additional duty of delivering the county gaols. If one of the justices was a clerk, the other was to associate to himself a layman for the purpose. It appears that this Statute was not properly observed; and that commissions of gaol delivery were being intrusted to persons—presumably clerks—procured by great men, with a view to securing pardon of felonies. It was therefore enacted by the Statute of Northampton (2 Edw. III. c. 2) that justices should not be appointed against the form of the Statute of Fines; and that assizes, attaints, and certificates should be taken before the justices commonly assigned, who should have a knowledge of the law, and none other. The Statute of 4 Edw. III. c. 2 ordained that good and discreet persons, “other than of the places,” should be assigned in all the counties of England to take assizes, juries, and certificates, and to deliver gaols. They were to perform these duties three times a year, and more often if need be.

Nisi Prius.

Besides providing for the taking of assizes, the Statute of Westminster, ii. c. 30, created the *Nisi Prius* jurisdiction of justices of assize. It provided that inquests in pleas of trespass in either bench not being of “enormous trespass,” and also inquests in other pleas in either bench not requiring great examination, might be taken before the justices of assize. But inquests which required great examination should be taken before the justices of the bench, unless both parties requested that an inquest should be taken before two justices of the bench, or one justice, and a knight, when they came into the county. This was carried out by a judicial writ in these words: “*Precipimus tibi quod venire facias coram justiciariis nostris apud Westmonasterium in octabis sancti Michaelis nisi. talis et talis tali die et loco ad partes illas venerint duodecim . . .*” The law as to the number of justices was altered by the Statute of Fines, c. 4, which provided that inquests

determinable before justices of either bench should be taken before any of the justices, before whom the plea was brought, with one knight of the county, unless it were an inquest which required great examination. Nothing was said about the consent of the parties.

• Accordingly the Statute of York, 12 Edw. II. c. 3, after reciting that the Statute of Fines, c. 4, needed explanation, declared that in cases of inquests in pleas of land, which did not require great examination, the inquest should be taken before one justice of the Court, in which the plea was brought, and one substantial man of the county, knight or other, if the demandant so requested. Inquests in pleas of land which required great examination, were to be taken in the country in the same way, but before two justices of the bench. Finally, the Statute of Northampton, 2 Edw. III. c. 16, enacted that all such inquests as were the subject of the Statute of York should be taken as well at the request of the tenant as of the demandant, but all other process, according to the Statute of York, in such case, was to be saved and kept. It may be observed that little is known of the interpretation put upon these Statutes, or how far their provisions were observed by the Government.

Till the year 1340, an inquest in the country could only be taken by a judge of the Court in which the issue was joined; and as it frequently happened that no judge of that Court went into the county where the inquest was to be taken, this was a matter of great inconvenience to suitors and jurors alike. By way of remedy it was enacted by 14 Edw. III., stat. 1, c. 16, that *Nisi Prius* might be granted before a judge of the Common Pleas in a suit in the King's Bench, or before a justice of the King's Bench in a suit in the Common Pleas; and if it should happen that no judge of either bench should go into the county where the inquest was to be taken, then *Nisi Prius* might be granted before the Chief Baron of the Exchequer, if a "man of law"; and in case no justice of either bench, nor the Chief Baron of the Exchequer went into the county where the inquest was to be taken, then *Nisi Prius* was to be granted to the justices assigned to take assizes in those parts, so long as one of the justices assigned was a justice of either bench or a king's serjeant. From the middle of the reign of Elizabeth the Barons of the Exchequer were always appointed serjeants, and from that time *Nisi Prius* could be granted before any judge of the three superior Courts of Common Law at Westminster. It should, however, be noticed that justices of assize had no jurisdiction to take inquisition of pleas pending in the Court of Exchequer; it was not until the year 1839 that they were enabled, by 2 & 3 Vict. c. 22, to do so without a special commission.

The Commissions.

During the two centuries which followed the Statute of 14 Edw. III. it became the settled practice for the king twice in every year to appoint his judges to take assizes, juries, and certificates. There were six circuits, including every county of England, except Middlesex and the counties palatine [see COUNTY PALATINE]; and to each circuit there were assigned two of the judges. They went on circuit in the vacations preceding Easter and Michaelmas terms, except the judges of the Northern Circuit, who did not visit the four northern counties in the spring vacation. The patent appointing them included the names of the serjeants practising on the respective circuits, who were thus able to sit as justices of assize, if it were necessary. This patent was also accompanied by a writ of association, by which the clerk of assize (*q.v.*) and his deputy, the associate and the clerk of

arraigns (*q.v.*), were associated to the judges and serjeants. A writ of admittance also issued, directing the judges and serjeants to admit these four circuit officials into their society as fellow-justices; and a writ called *si non omnes*, provided that if all the persons included in the patent and writ of association could not be present, then any two of them, of whom one must be a judge or a serjeant, might execute the commission. By 13 & 14 Vict. c. 25, Queen's counsel and barristers, having a patent of precedence, were enabled to act as justices of assize as fully, to all intents and purposes, as if they were of the "Degree of the Coif." See COIF.

Lord Bacon asserted (*Use of the Law*, 1630, p. 17) that justices of assize had five commissions, of which one was a commission of Nisi Prius and another the commission of the peace (*q.v.*). This assertion, which has been repeated by numerous writers of eminence, is not accurate. No patent was sent to the justices of assize authorising them to sit at Nisi Prius; their jurisdiction in this respect being merely incidental to the commission of assize; and all justices of assize and gaol delivery were in the commission of the peace within the precincts of their Courts, just as all judges of the King's Bench were *ex officio* in the commission of the peace for all counties (Lambard, *Eirenarcha*, 1610, p. 13). At the present time all judges of the Supreme Court of Judicature are specially named in the commission of the peace for each county.

The three commissions, which were always sent to the justices of assize, were the Commission of Assize, the Commission of Gaol Delivery, and the Commission of Oyer and Terminer. The first of these has already been discussed, and it has been shown that by the Statute *de finibus* justices of assize were also to sit as justices of gaol delivery. Since the date of that Statute they have had a commission which ordered them to deliver the gaol of every prisoner in it at the time of their arrival in the circuit town, by whomever indicted and for whatever crime committed. By construction of law a person is deemed to be in gaol who has been admitted to bail. The commission was directed to the two judges, the serjeants and Queen's counsel practising on the circuit, or some of them; occasionally to one or more barristers also practising there, and to the circuit officers, directing them or any two or more of them, of whom one was required to be a judge, serjeant, Queen's counsel, or barrister, to execute the commission. There were ordinarily no writs of association, admittance, and *si non omnes*, as in the case of the commission of assize. All persons intended to be included in the commission were named in the same patent.

The commission of oyer and terminer was addressed to the same persons as the commission of gaol delivery, and also to the Lord Chancellor, the President of the Council, and Lord Privy Seal, and the Lords Lieutenant of the several counties within the circuit. It directed them, or any two of them, one being a judge, serjeant, Queen's counsel, or barrister, to *inquire, hear, and determine* concerning treasons, felonies, and misdemeanours committed within the circuit. Under this commission persons could be tried whether they were in gaol or at large, but the judges could only act upon an indictment found at the same assizes, for they could not *hear and determine* by a petit jury until they had *inquired* by a grand jury. There was this distinction between the commission of assize and the commissions of oyer and terminer and gaol delivery. In the first of them, until the year 1850, the quorum necessarily consisted of judges and serjeants, but in the other two Queen's counsel, or even barristers, could always be of the quorum. It seems, too, that in the seventeenth century three commissioners were required to form a quorum in the commission of oyer and terminer (see *Clerk*

of *Assize*, 1682, p. 8; *Leveson v. R.*, 1869, L. R. 4 Q. B. 394); but the number necessary may have varied from time to time.

The Central Criminal Court.

• Since 1834, the criminal business of London, Middlesex, and certain designated parts of Kent, Surrey, and Essex has been carried out by a modern Court, called the Central Criminal Court, established by the Central Criminal Court Act, 1834. See article CENTRAL CRIMINAL COURT.

The Supreme Court of Judicature Act, 1873.

The Supreme Court of Judicature Act, 1873, considerably altered the functions of the judges in circuit. It provided, by sec. 16, that there should be transferred to and vested in the High Court of Justice all the jurisdiction, which, at the date of the commencement of the Act, was vested in, or capable of being exercised by, certain Courts, among which were the Courts created by commissions of assize, of oyer and terminer, and of gaol delivery, or of any such commission.

Sec. 29 of the same Act provided that Her Majesty might, by commission of assize or by any other commission, assign to any judge or judges of the High Court of Justice, or other person or persons usually named in commissions of assize, the duty of trying and determining, within any place or district specially fixed for that purpose by such commission, any causes or matters, or any question, or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the High Court; and any commissioner or commissioners appointed in pursuance of sec. 29 should, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of the Act, be deemed to constitute a Court of the High Court of Justice; and subject to any restrictions or conditions imposed by rules of Court, and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, might, with the leave of the judge or judges to whom or to whose division the cause or matter was assigned, require the question or issue to be tried and determined by a commissioner or commissioners, as in the Act aforesaid, or at sittings to be held in Middlesex or London, as was in sec. 37 of the Act mentioned, and such question or issue should be tried and determined accordingly.

Sec. 37 of the same Act provided, among other things, that sittings for trial by jury in London and Middlesex should be held by and before the judges of three common-law divisions of the High Court.

Since the Act of 1873, the same commissions have been issued to the judges and others, just as before, but the functions of the commissioners are different. The old commissioners of assize, when transacting civil business, merely tried by jury questions of fact in actions pending in the Courts at Westminster. They now can dispose of all questions of law, as well as of fact, as judges of the High Court of Justice. Their functions in criminal matters are, however, much the same as before.

Since 1884 the names of all the judges of the Supreme Court of Judicature have been placed in the various commissions; and before that date the names of the judges on the rota for the trial of election petitions were added to those of the judges or commissioners appointed for each circuit.

By the Supreme Court of Judicature Act, 1884, s. 7, County Court judges have every qualification which was conferred on Queen's counsel by the Act of 13 & 14 Vict. c. 25.

The Old Circuits.

The arrangement of circuits has been greatly changed during the present century. Prior to the year 1830 the six circuits were constituted as follows:—(1) The Home Circuit, consisting of the counties of Hertford, Essex, Kent, Sussex, and Surrey; (2) The Midland Circuit, consisting of the counties of Warwick, Leicester, Derby, Nottingham, Lincoln, Rutland, and Northampton; (3) The Norfolk Circuit, consisting of the counties of Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, and Buckingham; (4) The Northern Circuit, consisting of the counties of York, Northumberland, Cumberland, Westmoreland, Lancaster, and Durham; (5) The Oxford Circuit, consisting of the counties of Oxford, Worcester, Stafford, Salop, Hereford, Monmouth, Gloucester, and Berkshire; (6) The Western Circuit, consisting of the counties of Hampshire, Wiltshire, Dorset, Devon, Cornwall, and Somerset. To these were added by 2 Geo. iv. & 1 Will. iv. c. 70, the North Wales Circuit and South Wales Circuit. Three years later the Act 3 & 4 Will. iv. c. 71 empowered the Crown in Council (1) to order and direct from time to time at what places in England and Wales assizes and sessions under the commissions of gaol delivery and other commissions should be held; and to order and direct such assizes and sessions to be holden at more than one place in the same county on the same circuit; (2) to divide counties for the purpose of holding assizes in different divisions of the same county.

By Orders in Council of 10th June and 9th July 1864, made under this Act, the county of York was divided into the North and Eastern Riding and the West Riding Divisions. This Act has not been repealed.

In 1863 the Act 26 & 27 Vict. c. 122 empowered the Crown in Council to order and direct that any of the circuits of England and Wales should be altered by taking away from any circuit any county or counties or parts of any county or counties and annexing the same to any other circuit or circuits.

By an Order in Council of the 8th December 1863, made pursuant to this Act, the county of York was taken away from the Northern Circuit and annexed to the Midland Circuit; and the counties of Leicester, Rutland and Northampton were taken away from the Midland Circuit and annexed to the Norfolk Circuit.

The New Circuits.

The Judicature Act, 1875 (s. 23), enables Her Majesty by Order in Council to provide (1) for the discontinuance, either temporarily or permanently, wholly or partially, of any existing circuit, and the formation of any new circuit by the union of any county or part of counties, or partly in one way and partly in the other, or by the constitution of any county or part of a county to be a circuit by itself; and in particular for the issue of commissions for the discharge of civil and criminal business in the county of Surrey to the judges appointed to sit for the trial by jury of causes and issues in Middlesex or London, or any of them; (2) for the appointment of the place or places at which assizes are to be holden on any circuit; (3) for altering, by such authority and in such a manner as may be specified in the Order, the day appointed for holding the assizes at any place in any circuit in any case where by reason of the pressure of business or other unforeseen cause, it is expedient to alter the same.

By this section the Crown can deprive any county of the privilege of having assizes held at some place within it.

Pursuant to this Act, an Order in Council (W. N., 1876, p. 88) was made

on 5th February 1876, by which the then existing circuits were discontinued, and instead thereof new circuits were created. These were the Northern Circuit, consisting of the counties of Westmoreland, Cumberland, and Lancaster; the North-Eastern Circuit, consisting of the counties of Northumberland, Durham, and York; the Midland Circuit, consisting of the counties of Lincoln, Nottingham, Derby, Warwick, Leicester, Northampton, Rutland, Buckingham, and Bedford; the South-Eastern Circuit, consisting of the counties of Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent, and Sussex; the Oxford Circuit, consisting of the counties of Berks, Oxford, Worcester, Stafford, Salop, Hereford, Monmouth, and Gloucester; the Western Circuit, consisting of the counties of Southampton, Wilts, Dorset, Devon, Cornwall, and Somerset; the North and South Wales Circuit, consisting of the county of Chester and all the Welsh counties. The North and South Wales Circuit was divided into two divisions: the North Wales Division and the South Wales Division.

The Order also provided that the county of Surrey should not be included in any circuit, but that commissions should be issued not less often than twice in every year for the discharge of civil and criminal business therein.

The Dates of Circuits.

During the present century commissions of oyer and terminer and gaol delivery sometimes issued into certain counties during the vacation following the Michaelmas term. The sittings under these commissions were called Winter Circuits. The actual form of the commissions was the same as in the Spring and Autumn Circuits, except that they were addressed to all the judges instead of to two only, and that they contained a proviso that the commissioners should not be required to try any prisoner who should have been committed for trial at the next sessions of the peace in any of the counties of the circuit, but should be at liberty to order the prisoner to remain in gaol.

By the Winter Assizes Acts, 1876 and 1877, power was given to Her Majesty by Order in Council to unite counties for the purpose of Winter Assizes, that is, for assizes during the months of September, October, November, December, and January. The Acts also provided that the jurisdiction of the Central Criminal Court might be extended by the same machinery to neighbouring counties or parts of counties. The Spring Assizes Act, 1879, extended to Spring Assizes the power given to Her Majesty as to Winter Assizes. The system of grouping under these Acts was adopted for some years, but it was found to be attended with great inconvenience, particularly to the witnesses, who were often kept waiting at the assize towns for a considerable time at a long distance from their homes. This led to its discontinuance in the year 1888, but the Acts themselves have not been repealed.

By an Order in Council dated 26th June 1884 (W. N., 1884, p. 359), made pursuant to the Act of 3 & 4 Will. IV. c. 71, and the Supreme Court of Judicature Act, 1875, further provisions were made for fixing the commission days for the several assize towns of all the circuits, and for various other matters concerning the regulation of circuit business.

By an Order in Council of 28th July 1893 it was ordered that (1) the commission days for the several places on the respective circuits for the assizes to be thereafter holden should, so far as might be practicable and the business to be done might allow, be fixed by the judges at their meeting in manner theretofore accustomed in accordance with the scheme set out in the schedule thereto; (2) the county of Surrey should be included

in the South-Eastern Circuit; (3) there should be repealed so much of the Order in Council of 26th June 1884 as was inconsistent with any provision contained in this Order (W. N., 1893, p. 361).

The schedule provided for the holding of Summer and Winter Assizes for both civil and criminal business on all circuits; for the holding of an Autumn Circuit for criminal business only, except in Manchester, Liverpool, Leeds, and Swansea, where civil business was also to be transacted; and for an Easter Circuit for civil and criminal business in Manchester and Liverpool, and criminal business in Leeds.

The schedule was amended in the following year by an Order in Council of 28th May 1894 in order that Autumn Assizes might be held for the city of Birmingham.

Interpretation.

In the Interpretation Act, 1889, the expression "Court of assize" shall in that and every other Act, as respects England, Wales, and Ireland, mean a Court of assize, a Court of oyer and terminer, and a Court of gaol delivery, or any of them, and shall, as respects England and Wales, include the Central Criminal Court. By the same Act the expression assizes as respects England, Wales, and Ireland shall mean the Courts of assize usually held in every year, and shall include the sessions of the Central Criminal Court, but shall not include any Court of assize held by virtue of any special commission.

See also COUNTY PALATINE; EYRE; GAOL DELIVERY; INQUEST; JURY; NISI PRIUS; OYER AND TERMINER; VENIRE FACIAS.

Circular Note.—A negotiable instrument somewhat in the nature of a letter of credit (*q.v.*), being a request in writing by a bank to its correspondents abroad to pay a specified sum to a specified person. The payee is usually furnished with a "letter of indication" which is referred to in, and produced on presentation of, the circular note. This letter is signed by the manager of the bank, and also subsequently, in a space left for the purpose, by the payee, as a precaution against forgery.

The holder is not bound to cash circular notes, and in the event of his not electing to use them, may, after reasonable notice of such election, require payment at the issuing banker's hands (*Conflans Quarry Co. v. Parker*, 1868, L. R. 3 C. P. 1, where the nature and incidents of these notes are discussed at length). *Secus*, if any notes are lost, in which case the banker is entitled to an indemnity, the loss falling on the payee (*Conflans Quarry Co. v. Parker*, *ubi supra*; *Hume-Dick v. Herries & Co.*, 1888, 4 T. L. R. 541).

Circulation (of Newspaper containing Libel).—
See DEFAMATION; NEWSPAPER.

Circus.—A place adapted for the exhibition of feats of horsemanship, acrobatic displays, and juggling, and other performances. The construction and licensing of such places is subject to the control of the County Councils (51 & 52 Vict. c. 41, ss. 7 and 40 (8)), and they must be conducted so as not to become a nuisance, otherwise an indictment will lie (22 & 23 Vict. c. 17). By the Prevention of Cruelty to Children Act, 1894, 57 & 58

Vict. c. 41, s. 2 (d), it is an offence to cause or procure any child under sixteen, or for a parent or guardian to allow such child, to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, punishable on summary conviction by a fine not exceeding £25, or alternatively, or in default of payment of, or in addition to such fine, by imprisonment for a term of three months, with or without hard labour. But a parent or guardian may himself train such child, and anyone can apply to a petty sessional Court for a licence for a child of over seven years to take part in any circus or other similar entertainment, or to be trained therefor (s. 3 (1)). In the latter case the applicant must show that the child is fit for the purpose, and that proper precautions have been taken to secure its health and kind treatment (s. 3 (1)); and a Secretary of State may assign to the inspectors appointed under the Factory and Workshop Act, 1878, 41 & 42 Vict. c. 16, s. 67, the duty of seeing that the conditions imposed in the licence are carried out (s. 3 (2)).

Citation.—A term employed in the ECCLESIASTICAL COURTS to designate the process by which a suit was originated. It is now in use in the practice of the Probate and Divorce Division. In probate practice it is a summons issuing from the principal registry, chiefly used when persons having the primary right to a grant of probate or letters of administration neglect to apply for the same, and some person having an inferior interest desires to obtain a grant: the citation, therefore, cites the various persons with the superior interest to appear, and calls upon them either to renounce their right or show cause why the applicant should not obtain a grant. The statements in a citation must be verified by affidavit.

In divorce practice, a citation is served on the respondents, requiring them to appear and answer the allegations in the petition filed against them. It states the names of the parties, the nature of the relief sought by the petition, and gives notice that in default of an appearance the Court will proceed to hear the petition in the absence of the respondents.

Citizen is usually employed under the republican form of government as the equivalent of subject in monarchies of feudal origin. (See BRITISH SUBJECT.) In this country, though it means properly the inhabitants of a city, it is used of those possessing civic rights in any city or town.

City of London.—See LONDON CITY.

City of London Court.—See LONDON CITY; COUNTY COURT.

Civil Death.—Used in contrast with natural death to describe loss of all civil rights and status. It arose originally (1) by taking monastic vows; (2) by abjuring the realm (Bracton de Legg. Ang. f. 301 b, 421 b); (3) by conviction and attainder for treason or felony.

• The first two instances arose from the election of the person in question to put himself out of the pale of the common law: (1) By entering a monastery—most of which claimed to be wholly exempt from the authority

or visitation even of the diocesan of the county in which they lay. A person on entering into religion could make a will and his personalty went to his executors; or if he made no will, to his next-of-kin, and his estate to his heirs, which kept it out of mortmain. Old grants of estates for life were made "for natural life" to avoid the effect of monastic vows (2 Black. Com. 132; 2 Co. Rep. 48). (2) By claiming sanctuary, the consequence of which was to require him to abjure the realm wholly and for ever, and forfeiture of his land and goods. See SANCTUARY.

The first went with the suppression of the monasteries; the second with the abolition of sanctuary; and the third in 1870 by the Forfeitures Act, 1870, 33 & 34 Vict. c. 23, s. 1. The present position of a felon convicted of crime within the meaning of that Act, *i.e.* sent to penal servitude, is to suspend his liberty and civil rights till pardon or sentence served, and to vest his property in an administrator for his own benefit. Under the old system of transportation and before 1870, a convict under sentence of penal servitude or transportation seems to have been in chattel servitude to the Crown (see 6 *Law Quarterly Review*, 397-404). This position did not, however, make his killing no murder (Fost. *Crim. Law*, 79). The ruling of Lush, J., in *R. v. Webb*, 1867, 11 Cox, C. C. 133, that a man under sentence of death for capital felony is civilly dead and cannot be a witness, is no longer an authority, being given prior to the Act of 1870, and based on the old notions of disqualification of witnesses by crime and felons by attainder, and such a person has in recent times been actually allowed to give evidence.

Civil Law.—Civil law is the law of the Roman Empire, as codified by Justinian, and preserved, with some additions, in the collection known as the "*Corpus Juris Civilis*." This collection was so described by the "glossators" of the twelfth century, to distinguish it from the collections of ecclesiastical canons, which were afterwards embodied in the "*Corpus Juris Canonici*."¹ See CANON LAW.

Jus Ante-Justinianum.—The legislation of Justinian took effect at first only in the Empire of the East; and the Teutonic tribes which overran the Western Empire, so far as they administered Roman law at all, administered the uncodified system which they found prevailing in Italy, Gaul, or Spain, at the date of their arrival in those countries respectively. This system had been gradually developed from, or superadded to, the XII Tables, by laws passed in the popular assemblies, by the edicts of the praetors and aediles, by "*Senatus consulta*," by the writings of the jurists, and, lastly, by the "*Constitutions*" of the emperors, especially as collected in the code of Theodosius II. (A.D. 438). It was imperfectly set forth, for the benefit of their Roman subjects, by the Gothic conquerors, in such works as the *Edictum Theodorici*, the *Breviarium Alaricianum*, and the *Lex Romana Burgundionum*. Down to the twelfth century, it prevailed as the common law of the large portion of France known as the "*pays du droit écrit*"; and was undoubtedly at one time operative also in Britain. How far the law of Rome in this its comparatively inorganic and undigested condition, has left still subsisting traces of

¹ This use of "civil," as opposed to "ecclesiastical," law must be carefully distinguished from the classical opposition of "*ius civile*," the old strict law of Rome ("*quod quisque populus ipse sibi ius constituit*"), to "*ius gentium*," the modifications received by the former to adapt it to commercial intercourse with foreign nationalities ("*quod naturalis ratio inter omnes homines constituit, id apud omnes populos perque custoditur, vocaturque ius gentium*"); as also from the modern use of "*Droit civil*," "*Civilrecht*," in the sense of "private," as opposed to "public" law. "Civil" is no longer used on the Continent as equivalent to "Roman" law.

its diffusion through the various countries of Europe, is, in each case, a question which has given rise to controversy. In Italy there is no doubt that, after the year 554 A.D., it gave place to the legislation of Justinian.

The Legislation of Justinian.—It will now be necessary to give some account of the reforming labours of the Emperor Justinian, at the date of whose accession to the throne of the East, 527 A.D., the voluminous and inaccessible character of the law had become a serious evil. Not to mention the more ancient of the sources of law already mentioned, the writings of the authoritative jurists alone were estimated as filling two thousand books; while the Imperial constitutions issued since the close of the Theodosian code had never been collected or arranged. Besides these defects of form, the law presented grave defects of substance. Side by side with modern concessions to equity and convenience, it had retained many harsh and narrow institutions, handed down from a barbarous antiquity. The law needed to be reduced in bulk, cleared of anachronisms, relieved from contradictions, and arranged upon some intelligible system. All this was accomplished in an incredibly short space of time, by a series of Imperial commissions, on which Tribonian, quæstor of the palace, played the leading part. The constitutions, or, as we should say, the statute law, was arranged in a so-called code of twelve books, which was promulgated in 529, and as finally revised (*"Codex repetitæ prælectionis"*) in 534 A.D. The opinions of the great jurists, corresponding to our case-law, were selected and grouped in the fifty books which compose the *"Digesta"* or *"Pandectæ,"* published in December A.D. 533. A manual for students, called *"Institutiones,"* largely modelled upon the work of the same name which had been written four centuries previously by Gaius, was issued in November in the same year. All those publications were declared to have the force of law, and any reference to the enormous mass of legal literature from which they had been extracted, was forbidden for the future. This piece of legislation was not to be disturbed by subsequent enactments, which under the style of *"Novellæ Constitutiones"* were to be collected separately. Such was the body of law which, after the conquests of Narses, was imposed in 554 A.D., by a pragmatic sanction,¹ upon Italy, whence its authority was never afterwards dislodged, supplanting throughout the peninsula the system which continued to suffice for the Visigothic and Burgundian kingdoms. It was this new legislation which so powerfully affected the life of the nations of Western Europe and of their colonial derivatives. With this alone, the most enduring monument of the practical genius of the Roman people, embodying as it does precepts of conduct elaborated by them during a thousand years, shall we be immediately concerned in the present article. We may leave out of consideration not only the ante-Justinianean law, to which some reference has already been made, but also the post-Justinianean legislation of the Byzantine Empire, eventually consolidated in the *"Basilica"* of Leo Philosophus (888–892 A.D.).

The Revival of Roman Law.—It is an exploded error to suppose that the practice or study of the Roman law, as codified, ever wholly ceased in Italy, or that its revival was due to the discovery, on the capture of Amalfi by the Pisans, in 1135, of what is now known as the Florentine MS. of the Digest.²

Roman law throughout the peninsula, as elsewhere, had always governed ecclesiastics and the course of legal procedure. It was also the personal law of the conquered race, though the conquerors were controlled by their own

¹ *Quod videtur* in the *"Corpus Juris,"* after the Novells of Tiberius.

² This MS., probably of the seventh century, was printed at Florence in 1553.

Teutonic customs. The principal seat of legal study was at Rome, till it was removed, apparently in the eleventh century, to Ravenna, and thence, finally, about the commencement of the twelfth century, to Bologna ("cum studium esset destructum Romæ, libri legales fuerunt deportati ad civitatem Ravennæ, et de Ravenna ad civitatem istam," *Odofredus ad Dig.* i. 1-6). Here it was that the great series of commentators, known as the "glossators," toiled at the interpretation of the "*Corpus Juris Civilis*." As this collection first took form, it consisted of five volumes, viz.: (1) The *Digestum Vetus*; (2) The *Infortiatum*; (3) The *Digestum Novum*, containing, respectively, bk. i. to bk. xxiv. tit. 2, bk. xxiv. tit. 3 to bk. xxxviii., and bks. xxxix. to l. of the Digest; (4) The *Code*, containing bks. i. to ix. of Justinian's Code; (5) The *Volumen Parvum*, containing the Institutes, the "Authenticum," and some other collections of "Novellæ Constitutiones," the "*Libri Feudorum*," and the "*Tres Libri*," i.e. the long missing bks. x. to xii. of the Code. It was upon these materials, thus arranged, that the glossators, from Irnerius (1100 A.D.) downwards, bestowed minute and unremitting labour, the results of which were summed up in the great gloss of Franciscus Accursius, the elder (1182-1258). The next school of commentators, known as "Post-glossatores," or "Scribentes," of whom perhaps the most eminent were Bartolus and Baldus of Perugia, flourished from the middle of the thirteenth to the end of the sixteenth century. Their method is that of the schoolmen. They expounded the gloss rather than the text,¹ and their language is described by Rabelais as "Latin de cuisinier et marmiteux, non de juris-consulte." This school was succeeded, under the impulse of the Renaissance, by the "Humanists"; such as were, in Italy, Alciatus (1492-1559), and in France, where the new school chiefly flourished, Cujas (1522-1590), Hotman (1524-1590), and Donellus (1527-1591). In those days the "*Corpus Juris Civilis*" was first edited under that title (arranged, in accordance with the method still customary, so as to comprise successively the Institutes, the Digest, the Code, the Novells, and the feudal additions) by Denis Godefroy, at Geneva and Lyons in 1583; three years after the "*Corpus Juris Canonici*" had been first published as such, by order of Pope Gregory VIII. For the subsequent elucidation of the civil law the world has been mainly indebted in the seventeenth and eighteenth centuries to the Dutch; and, in our own times, to the Germans.

The "Reception."—As originally in Italy, so, sooner or later, everywhere within the limits of what had been the Empire of the West, the legislation of Justinian supplanted the earlier Roman law sources known to the barbarian invaders; becoming in most places the common law, to which the Teutonic customs were the exception. The so-called "Reception," or full adoption of Roman law, to this extent, occurred at different dates in the several States of the European continent. In Germany, where the change produced was most noticeable, it was hardly complete before the middle of the sixteenth century. Elsewhere it occurred somewhat earlier. In later times, the Spaniards and the Portuguese, the French and the Dutch carried the ideas and the nomenclature of Roman law to their respective colonies in America, Asia, and Africa.

The Civil Law in England.—There can be no doubt that Roman law was in force in Britain, as in the other provinces of the Empire. We know, for instance, that it was administered in the prætorian Court at York, in the reign of Septimius Severus, by the greatest of all the jurists, Papinian. Whether, however, its influence survived the Saxon conquests, may well be questioned. The *a priori* arguments in favour of this having been the case

• ¹ "Non glossant glossas sed glossarum glossas."

are deserving of attention, but the actual traces of any continued prevalence of the system in pre-Norman times, outside of the organisation of the Catholic Church,¹ are slight, and hardly more than may be accounted for by intercourse with the Continent. The revival of the study and influence of Roman law in England took place, not by way of a return to the law which had been in use in Roman Britain, but through the introduction into this country, direct from Italy, of the *Corpus Juris* of Justinian. It was in the reign of Stephen, and apparently about the year 1144, that Theobald, Archbishop of Canterbury, imported, probably from Bologna, a supply of law books, and at the same time the learned jurist, Vacarius, who afterwards became the earliest teacher of the subject at Oxford, and compiled for the use of his students an epitome of the Digest and Code, long famous as the "*Liber Pauperum*."² The teaching of Vacarius was before long silenced by Stephen, and the possession of books of Roman law was made penal; but this policy was shortlived, and there is no doubt that what may be described as an "arrested reception" of Roman law occurred in this country. A considerable familiarity with Roman law is visible in the writings of John of Salisbury, William of Malmesbury, and Peter of Blois. The preface of Granvill's "*Tractatus de legibus et consuetudinibus Angliæ*" is modelled on the Proem to Justinian's *Institutes*, and the great work of Henry de Bracton, one of Henry III.'s judges (*circa* 1260), while professing to state the common law of England, interweaves such portions of it as had then been developed into the fabric of a systematic exposition of Roman law principles, borrowed, in the main, textually, though without acknowledgment, from the "*Aurea Summa*" of the glossator Azo.³ The service thus rendered by Bracton to the development of English law was great; but English jealousy of the introduction of foreign rules into the indigenous system, which had already found expression, *e.g.* in Roger Bacon's "*Compendium Studii*," became in the fourteenth century so marked as to compel the judges thenceforth to resort but sparingly, and, as it were, by stealth, to the stores of reasoned wisdom accessible in the *Corpus Juris*; though some of them doubtless agreed with Lord Hale, who, as we are told, "often said that the true grounds and reasons of law were so well delivered in the Digests, that a man could never understand law as a science so well as by seeking it there."⁴ The borrowings of the clerical chancellors from this source, though more extensive, were hardly less disguised than those of the common lawyers. The influence of the civil law is, however, unmistakable in the decisions of, for instance, Lord Holt, Lord Mansfield, and Lord Hardwicke.

The English Courts of the Civil Law.—While the ordinary Courts of the realm were thus early emancipated from the direct influence of the Roman system, it was allowed free play in certain Courts having a strictly limited and special jurisdiction. These were the ecclesiastical Courts, the Court of the Lord High Admiral, the Court of the Constable and Marshal, and the privileged Courts of the two universities. All of these were, however, closely watched by the Supreme Courts at Westminster, and checked by

¹ There is some evidence of study of Roman law in monasteries in the seventh and ninth centuries. See Savigny, *Geschichte*, ii. s. 58.

² See Wenck, *Magister Vacarius*, 1820, and Oxford Historical Society, *Collectanea*, ii. pp. 143, 165-175.

³ On Bracton's debt to Azo, see Güterbock, *Henricus de Bracton und sein Verhältniss zum Römischen Recht*, 1862, and Prof. Maitland's *Select Passages from the Works of Bracton and Azo*, 1895, in the Selden Society's Publications. On the extent to which the "*ius scriptum*" was regarded as of binding authority in England, see Maitland's *Bracton's Note Book*, pl. 1227.

⁴ Burnet, *Life and Death of Sir Matthew Hale*, 1682.

writs of prohibition in any attempt to exercise new powers. In all of these Courts, of which some account is given elsewhere, the practitioners were not, as at Westminster, barristers and attorneys, but advocates and proctors. While barristers received their training at the Inns of Court, advocates were educated at the universities, where they qualified for their profession by taking the degree of Doctor of Law.¹ The advocates so qualified, who were congregated in the city of London, eventually formed a society of "Doctors exercent in the Ecclesiastical and Admiralty Courts," which in 1587 acquired a settled habitation, with dining-hall and chambers, hard by St. Paul's; and was formally incorporated in 1768. The civilians, who were usually also canonists, having graduated in both faculties, owed their early importance largely to their monopoly of business in the numerous ecclesiastical Courts, resulting, as it did, in frequent appeals to Rome, for conducting which the cosmopolitan legal training which these men had received was absolutely indispensable. The decline in such business, brought about by the Reformation, was a sore discouragement to civilian study. "The books of the civil and canon law," we are told, "were set aside to be devoured by worms, as savouring too much of popery."² But even in the latter half of the nineteenth century, the doctors continued to divide among them a number of lucrative offices. From them alone, as a rule, were chosen the Dean of the Arches, the Master of the Faculties, the judge of the Prerogative Court, the judge of the High Court of Admiralty, the official principal of the Archbishop of Canterbury, and the chancellors of the various dioceses. The position which they occupied may be inferred from the fact that the head of the practising advocates, the Queen's Advocate-General, ranked at one time above the Attorney-General. Before the organisation of a diplomatic service, the civilians were frequently, and naturally, employed in negotiations with foreign States, and consulted upon international controversies. Their assistance was also thought useful to the Legislature, and it was to increase the likelihood of the presence of some of their order in Parliament that James I. conferred upon the universities the right of sending members to Westminster. There is, indeed, no doubt that the order regained in these ways, about the end of the sixteenth and beginning of the seventeenth centuries, some of its old reputation; a result which was largely promoted by the stimulus given to the intelligent study of Roman law, and to its application to the then rudimentary law of nations, by the teaching at Oxford of Alberico Gentili, who had brought thither the solid learning and systematic methods which he had himself acquired from a distinguished group of professors at Perugia. A contemporary speaks of him as one "who by his great industrie hath quickened the dead bodie o the civile law written by the auncient civilians."³

Among those who must have indirectly felt his influence were, Arthur Duck, the author of the celebrated little work, "*De usu et auctoritate Juris Civilis Romanorum*"; Richard Zouch, Regius Professor at Oxford, and subsequently judge of the Admiralty; and Sir Leoline Jenkins, also judge of the Admiralty. The academical study of Roman law seems to have

¹ "Doctor legum" (LL.D.) and "Doctor iuris civilis" (I.C.D.) are synonymous terms for the degree in civil law. The degree of "Doctor iuris canonici," or "in Decretis," ceased to be conferred in pursuance of an injunction of the year 1536. The degrees in civil and in canon law seem always to have been conferred separately in England; not cumulatively, in a Doctorate "*utriusque iuris*."

² Ayliffe, *Antient and Present State of the University of Oxford*, 1714, i. p. 188.

³ Fulbecke, *Direction*, 1600, c. 3.

died away by the middle of the eighteenth century. At Oxford, Henry Brooke (1736-1754) delivered regular courses of lectures, but his successors were actively engaged in practice at Doctors' Commons, and the office of Regius Professor was almost a sinecure till Mr. Bryce was appointed to it in 1870. In spite of this lack of scientific training, the College of Advocates maintained a high reputation for learning and ability. Of its members in the last century it may be enough to mention Sir George Lee, Sir George Hay, Dr. Lawrence, and last, not least, Sir John Scott (Lord Stowell), who may be said to have re-created the law of prize. Of those who have flourished in the present century, but are no longer living, the most eminent were, perhaps, Sir Christopher Robinson, Sir Stephen Lushington, Sir Robert Phillimore, and Sir Travers Twiss. The Prize Court was still in the hands of the civilians during the Crimean War, but under the Act of 1857 the College of Advocates, so long a nursery of learning in questions of ecclesiastical, testamentary, maritime, and international law, was, rightly or wrongly, dissolved. It is some compensation for the fall of this ancient institution that the study of the civil law has during the last half-century, and especially during the last twenty years, experienced a marvellous revival in this country, becoming an essential part of the legal curriculum, not only at the universities, but also at the Inns of Court. The civil law is, however, now studied, not with a view to practice in any special class of Courts, but rather as imparting a grasp of legal ideas ("Servatur ubique ius Romanorum non ratione Imperii, sed rationis imperio"), as enabling the learner to look at a legal question from more sides than one, as giving him some familiarity with the genius and the nomenclature of the system which has exercised so predominant an influence over continental bodies of law, with which a modern practitioner is so often brought into contact, as also over the ideas and phraseology of international law. The study is also useful to the English barrister who is likely to take part in Scotch appeals to the House of Lords, or in appeals to the judicial committee of the Privy Council from those British dependencies which are governed by systems mediately or immediately derived from the law of Rome. Such are British Guiana, the Cape Colony, and Ceylon, in which the Roman Dutch law (Rooms Hollands Regt) prevails; Trinidad, deriving its law from Spain; St. Lucia and Lower Canada, originally governed by the Coutume de Paris; Guernsey and Jersey, whose law is derived from the Coutume de Normandie. The Mauritius had, before its conquest, received the Code Civil, which is described by its compilers as "une transaction entre le droit écrit et les coutumes"; and the law of Malta is essentially Roman.

[In addition to authorities incidentally mentioned, reference may be usefully made to—A. Duck, *De usu et auctoritate Juris Civilis Romanorum per dominia Principum Christianorum*, 1653; Hale, *History of the Common Law*, cc. 2, 5; Savigny, *Geschichte des heutigen Römischen Rechts*, 1834; [Coote], *Sketches of the Lives and Characters of Eminent English Civilians, by one of the Members of the College*, 1804; Rivier, *Introduction historique au Droit Romain*, 1881; Tardif, *Histoire des sources du Droit Français, Origines Romaines*, 1890; T. E. Scrutton, *The Influence of Roman Law on the Law of England*, 1885; Pollock and Maitland, *History of English Law*, 1895, i. c. 4.]

Civil Service.—Down to a comparatively recent time, the clerks and subordinate officials employed in the public service were appointed by the heads of departments; as a general rule, they were not required to undergo any test of their knowledge and capacity. The report prepared

by Sir S. Northcote and Sir C. Trevelyan in 1853 was the beginning of a new order of things. By an Order in Council of the 21st May 1855 the Civil Service Commission was appointed to organise a system of examination. The situations to which the principle of open competition is applied are specified in the schedules to the Order of 4th June 1870. Persons appointed after examination enter on a six months' period of probation. The Playfair Scheme, establishing a Lower Division of the Civil Service, was confirmed by an Order of the 12th February 1876; the name "Lower Division" was altered to "Second Division," and other changes recommended by Sir M. W. Ridley's Commission were introduced by the Orders of 21st March and 15th August 1890. Members of the Civil Service hold their places during pleasure, but in practice they are recognised as permanent officials; they are not dismissed unless for misconduct or inefficiency, and they are entitled to pensions on retirement. See the 22 Vict. c. 26, and, as to commutation of pensions, the 34 & 35 Vict. c. 36. In this as in other branches of the public service, the relation between superior and subordinate is not contractual in its nature; all alike are servants of the Crown. It was held that a clerk in the War Office could not maintain an action against the Secretary at War for arrears of pay (*Gidley v. Lord Palmerston*, 1822, 3 B. & B. 275). Members of the Civil Service are expected to act loyally upon the directions of the political heads of departments, whatever be the party to which the Ministers for the time being belong. It is therefore considered to be improper for a civil servant to take an active or conspicuous part in politics; and an Order in Council of the 29th November 1884 directs that a civil servant who becomes a candidate for a seat in the House of Commons is to resign his office.

Civil War (see BELLIGERENT).—In the "Instructions for the Government of Armies of the United States in the Field" issued during the American Civil War, the following definition is given:—"Civil war is war between two or more portions of a country or State, each contending for mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious portions of the State are contiguous to those containing the seat of government" (art. 150).

Claim, Statement of.—See STATEMENT OF CLAIM; INDORSEMENT OF CLAIM.

Claiming Under.—See QUIET ENJOYMENT, COVENANT FOR.

Clandestine Marriages.—See MARRIAGE.

Cleansing and Disinfecting.—See DISEASE; PUBLIC HEALTH.

Clear Days.—"Clear days" are days reckoned exclusively of both terminals. See *Liffin v. Pitcher*, 1842, 1 Dow. N. S. 767.

Clear Income.—The net amount of a person's income after payment of all outgoings.

On Rule 126 of the Lunacy Rules, 1892, which provides that a percentage is payable on the "clear annual income" of lunatics so found by inquisition, it has been held that in the case of a lunatic so found in England whose whole property was in Ireland, where the inquisition proceedings had been enrolled, and where a percentage had been paid on the clear annual income, that an annual amount of such income sent to England for her maintenance was not "clear annual income" within the rule, and, therefore, no percentage was payable thereon (*In re Grham* [1895], 2 Ch. 12).

Clear Yearly Sum.—A gift by will of an annuity or clear yearly sum is a gift clear of legacy duty (*Gule v. Mumford*, 1837, 2 Y. & C. Ex. 448); but a direction by a testator to his trustees to invest an amount of consols sufficient to realise the "clear yearly income of £150," and to pay the dividends to his nephew, was held not to make the dividends payable free from legacy duty (*Banks v. Braithwaite*, 1863, 32 L. J. Ch. 35). In that case, Kindersley, V. C., said: "There is no gift of an annuity, but what is given is the dividend of a sum of stock. It is not said that the legatee is to have the dividends clear, but the amount of stock is to be thus ascertained."

To free an annuity from income tax it must be clear from the terms of the gift that the testator so intended: words which have been held sufficient to exempt a legacy or annuity from legacy duty have been held insufficient to exempt the same from the payment of income tax.

[See Jarman on *Wills*, 5th ed., vol. i. p. 151 n.; Theobald, *Law of Wills*, 4th ed., 156, 157.]

Clearing House.—The London Bankers' Clearing House was organised, and is now employed, by the leading banking firms in London for the double purpose of saving time and trouble in the presentment for payment of cheques and bills by one broker to another, and arranging for the payment to be made as far as possible by set off, without the exchange of actual money.

The Clearing House was established about 1775 (*Encyclopædia Brit.*, 9th ed., "Banking"), and its operations were extended to clearing country cheques and drafts payable on demand (see below) in 1858. The principal banks in London are members, and make use of it, and the smaller banks do their "clearing" through one or other of the members. The Bank of England, which acts as the banker of the Clearing House itself, uses it for making presentation to and receiving payment from other banks, but not for the converse operations (Chambers, *Encyclopædia*, ed. 1889, "Clearing House"). It has been held from Lord Ellenborough's time that where a bill is payable at a bank, presentation to the clerk of the bank at the Clearing House is sufficient (*Reynolds v. Chettle*, 1811, 2 Camp. 595; *Harris v. Pucker*, 1833, 3 Tyrw. 370), and there is no doubt that the usual course of presentment and payment through the Clearing House is part of the usage of bankers, and is a reasonable usage (see the cases cited below). The course of business at the Clearing House will be found fully stated in Howarth, *Our Clearing System and Clearing Houses*, and is summarised in Mr. R. H. Inglis Palgrave's *Dictionary of Political Economy*. Its usages as regards presenting

cheques for payment were found as facts in the cases of *Boddington v. Schlencker*, 1833, 4 Barn & Adol. 752; and *Warwick v. Rogers*, 1843, 5 Man. & G. 340. Each member of the house employs a number of clerks, who all meet at the Clearing House in the morning at 10.30 o'clock for the first clearing. The clerks of each bank deliver to the clerks of the banks upon which the cheques or bills to be presented by them are drawn, the drafts, and also a statement of their amounts. This exchange is concluded by 11 o'clock, and the presented cheques and bills are then taken to the offices of the banks. At 2.30 o'clock the second clearing opens, and cheques and bills are presented as before until 4 o'clock, when the doors are closed and no more cheques or bills can, on that day, be cleared through the House. The second clearing is continuous, exchanges being made, and the cheques and bills taken away for reference and brought back from time to time throughout the afternoon. Cheques and bills which are not honoured are returned at any time throughout the day and up to 5 o'clock, and they may, if not so returned, be returned and charged back for subsequently. Cheques or bills may be returned in this way, even though the signatures have been cancelled in the usual manner or by mistake (*Warwick v. Rogers, sup.*). In the case cited the acceptor's bank received orders not to pay after cancelling the signature. Balances are struck by each bank with every other bank at the end of the day, and their respective accounts are adjusted. Each bank then makes up its account of debits and credits (see specimen in Chambers, *Encyclopædia, ubi sup.*), and the resulting final debit or credit is in each case settled by a transfer to or from the Clearing House account at the Bank of England, which is checked by the inspectors of the House.

An attempt was made in *Boddington v. Schlencker*, 1833, 4 Barn. & Adol. 752, to prove a custom binding London bankers, as between themselves and their customers, to clear all cheques on the day they received them; but this was not established, and Parke, B., said the banker has, as against his customer, the same time as he has against the drawer to present the cheque, that is to say, the whole of the day, during banking hours, following the receipt. In order to save time, by special instructions, London bankers present cheques for payment direct to the drawer's bank. For this they usually charge a small fee.

Cheques and bills received too late for clearing before 4 o'clock are sent by London bankers direct to the bank at which they are payable, and are there initialled for payment next day (*Boddington v. Schlencker, sup.*). The initialling constitutes only a provisional undertaking to pay, which may be withdrawn (*Pollard v. Bank of England*, 1871, L. R. 6 Q. B. 623). It means that the bank initialling the draft will pay it in preference to subsequent drafts (Grant on *Banking*, 4th ed., 53).

Country Clearing.—The practice of clearing through the London Clearing House country cheques and drafts payable at sight (to which alone this system applies) was introduced in 1858, and shortly afterwards it was held to be a reasonable usage for bankers to adopt even where, as in the case in question, it caused a cheque received on Friday to be presented to the drawer's bank on the following Monday morning instead of on Saturday, as would have been the case if it had been posted direct (*Harc v. Henty*, 1861, 10 C. B. N. S. 302; see also *Prideaux v. Criddle*, 1869, L. R. 4 Q. B. 455). The country bank sends the cheque by the evening post on the day of its receipt to its London agent, who presents it to the London agent of the bank upon which it is drawn, at the Clearing House, in the manner already described. The receiver then sends it by the evening post to the last-

mentioned bank, which, by the following night's post, either authorises its London agent to pay, or else advises it that the cheque is dishonoured, and sends the cheque itself direct to the country bank by which it was forwarded to London.

The country cheques and drafts are exchanged at the Clearing House between 12 and 2.15 o'clock in the day, and no balance is struck in respect of each day's cheques or drafts until the day but one following, in order to admit of reference, as above described, to the drawer's country bank. Besides the London Clearing House there are similar institutions for local purposes at Manchester, Liverpool, Birmingham, Newcastle, Leeds, Sheffield, and Bradford, several in Scotland, and one at Dublin in Ireland.

Other clearing houses exist besides the Bankers', of which the most important are the Railway Clearing House for dividing and distributing charges and fares in respect of through traffic, and for inquiries as to lost luggage. (See the Railway Clearing Act, 1850, 13 & 14 Vict. c. 33 (local); and the Clearing House Act (Ireland), 23 Vict. c. xxix. And the "Cotton Brokers Bank Limited" at Liverpool.)

Clement's Inn.—See INNS OF CHANCERY.

Clergy.—The members of the Church of England are divided into clergy and laity. The clergy, that is to say the members of the *status clericalis*, are that body of men who have a peculiar and defined position in this Church, and are distinguished from the laity by their ordination. The clerical order consists of bishops, priests, and deacons. The clergy are also known as the Spirituality, a fact emphasised in the Act 27 Hen. VIII. c. 12. In the Middle Ages the *status clericalis* carried with it special privileges, both civil and political. As to the former privileges of the clergy before the criminal law, see BENEFIT OF CLERGY.

The clergy, as such, whether beneficed or unbeneficed, constituted a separate estate of the realm with the nobles and the Commons. Thus the clergy were summoned to Parliament as a separate estate by Edward I. in 1295.

The clergy, however, did not continue to form a separate order in the English Parliament. In fact, the estate of the clergy as such appear not to have taken part in the Parliament after the time of Edward II., its members preferring to vote money to the Crown in Convocation. This practice continued to the year 1663, when the clergy for the last time imposed a tax on themselves. Shortly after this, by an informal arrangement between Lord Clarendon and the then Primate, Archbishop Sheldon, the clergy were charged in an Act passed in 1665 with a tax in common with the laity, and discharged from the subsidies that they had previously voted in Convocation. There was an express saving clause in the Act of the right of the clergy to tax themselves in Convocation; but from this time no such right has ever been exercised. After this time the clergy who were not Lords of Parliament began to vote at the elections for members of the House of Commons, a right recognised by the Statutes 10 Anne, c. 81, and 18 Geo. II. c. 18. The writ summoning a bishop to Parliament, however, still makes provision for this election.

• From the old position of the clergy as an estate of the realm arises their common law disability to be members of the House of Commons.

The reason assigned for this disability by Coke, Blackstone, and other authorities, and which was given by a joint-committee of both Houses of Parliament in 1523, viz. that the clergy sit in Convocation, is unsatisfactory, but the fact that the clerical body was regarded as an order or estate different from the Commons will, however, explain it. The House of Commons Clergy Disqualification Act, 1801, 41 Geo. III. c. 63, which was passed to remove doubts on the subject, provides that no person having been ordained to the office of priest or deacon shall be elected to serve in Parliament as a member of the House of Commons. By the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, it is enacted (s. 12 (6)), a person shall be disqualified for being elected, and for being a councillor (i.e. a borough councillor), if and while he (b) is in holy orders. Under the same Act (s. 143), a person shall not be qualified to be elected or to be an alderman unless he is a councillor or qualified to be a councillor, and sec. 15 (1), the mayor shall be a fit person elected by the council from among the aldermen or councillors or persons qualified to be such. Therefore a clergyman cannot be a mayor, alderman, or town councillor. But the Clergy Disabilities Act, 1870, 33 & 34 Vict. c. 91, provides that these disabilities shall not extend to clergymen who have executed a deed relinquishing their profession.

Ecclesiastical persons, as such, are not bound at common law to serve in a temporal office, even though they hold lands or tenements of which the holders ought to perform such services, and of which the services may be performed by deputy. (See further on this subject, Phillimore, *Ecc. Law*, vol. i. ch. xviii., 2nd ed., p. 473.)

As to the lands of the clergy and taxation, see INCUMBENT; and see also ARCHBISHOP; BISHOP; DEAN AND CHAPTER; ARCHDEACON; PRIEST; DEACON.

Clerical Error.—(1) *In Matters of Record.*—By Order 28, r. 1, the Court or a judge may at any stage of the proceedings allow an indorsement on a writ or the pleadings to be amended, and, by rule 11 of the same Order, clerical mistakes in judgments or orders, or other accidental slips or omissions therein, may at any time be corrected by the Court or a judge on motion or summons without appeal. The County Court Rules, 1889, contain similar provisions (see Order 14, rr. 2, 6, 11), and in the practice of these Courts no misnomer or inaccurate description of any person or place in a summons will vitiate it if the description given sufficiently identifies these (51 & 52 Vict. c. 43, s. 73). Accordingly, words stating that certain defendants were sued in a representative character have been allowed to be struck out (*Temperton v. Russell* [1893], Q. B. 435), as also the names of co-petitioners for the appointment of new trustees who had not authorised the petition (*In re Saraye*, 1880, 15 Ch. D. 557); and the Court has amended a winding-up order before it was finally drawn up by deleting the word "company" (*In re Army and Navy Hotel*, 1886, 31 Ch. D. 645), and altered the record of its order where that seemed to cover more than was really decided (*In re Swire*, 1885, 30 Ch. D. 239); and even where the alteration materially changed the order, as by the substitution of the words *per capita* for *per stirpes* (*In re Blackwell*, 1886, W. N. 97), without any special motion or summons, though in the second last-mentioned case the applicant had to pay the costs of his application, and in the last-mentioned one he had to incorporate the circumstances in an affidavit to be entered in the revised order. But, apart from the Judicature Act, every Court has under

its original powers the ability to vary its own orders drawn up in the registry, or in the office of the Court, in such a way as to carry out its own meaning (*Laurie v. Lees*, 1881, 7 App. Cas. 19, 34, per Lord Penzance; *Hatton v. Harris* [1892], App. Cas. 547; *Milson v. Carter* [1893], App. Cas. 638). It is not, however, competent to the parties to agree to alter an order actually made by a judge, and if they wish such order to be modified they must come to the Court and have it amended there (*Blake v. Harvey*, 1885, 29 Ch. D. 827).

In the same way in criminal trials judges can cause an indictment or information for any offence whatever to be forthwith amended when there is a variance between some matter in writing or print produced in evidence and the statement thereof (11 & 12 Vict. c. 46, s. 4), or when there is a variance between the statement in an indictment and the evidence as to the name of any county, town, person, or other fact, provided such variance is not material to the merits of the case or the alteration will not prejudice the defendant in his defence on such merits (14 & 15 Vict. c. 100, s. 1). And no indictment shall be held insufficient for want of averment of any matter unnecessary to be proved, or other immaterial additions and omissions and mistakes (14 & 15 Vict. c. 100, s. 24). No objection, too, is to be taken to any information, complaint, or summons within the Summary Jurisdiction Act for alleged defects in substance or in form or for variance with the evidence, but if the variance seems to have misled the party summoned the justices may adjourn the hearing (11 & 12 Vict. c. 43, s. 1).

(2) *In Deeds and other Documents*.—If a clerical error is discovered in these prior to execution or completion, the usual practice is for the parties to correct it and initial the correction. If a deed has been executed, however, and requires rectification, the proper course is to apply in the Chancery Division under the Judicature Act, 1873, s. 34 (3); and any written document may be varied, altered, or explained by parol evidence, if it appears there has been some accident or mistake, this exception to the general rule excluding parol to explain writing being admitted to promote good faith and confidence and suppress fraud (*Henkle v. R. E. Assurance Co.*, 1749, 1 Ves. 317, per Lord Hardwicke). But though the rectification of deeds is properly business for the Chancery Division, if the alteration of a deed in which there is a clerical error is relied on by a defendant in one of the other Divisions, such Division will give effect to the equity, so far as necessary, without going through the manual labour of reforming the document (*Mostyn v. West Mostyn Coal and Iron Co.*, 1876, 1 C. P. D. 145; *Breslauner v. Barwick*, 1877, 36 L. T. N. S. 52; *Storey v. Waddle*, 1879, 4 Q. B. D. 289). The Courts will not, however, make corrections which will prejudice the rights of *bona fide* purchasers for value without notice, and where the error is of the nature of an omission the filling up of which is not obvious, as a blank in a will, for the surname of a legatee, they have refused to make it good (*Ricket's Estate*, 1853, 1 Eq. Rep. 251).

Clerk in Holy Orders.—See CLERGY.

Clerk of Arraigns.—An officer attached to Assize Courts and to the Old Bailey. In the absence of the clerk of assize (*q.v.*) he opens the Assize. He also performs the general duties at the arraignment of the prisoner, and puts the formal questions to the jury when delivering their verdict. He is appointed by the clerk of assize.

Clerk of Assize is the officer who "writes all things judicially done by the justices of assizes in their circuits" (Tomlins' *Law Dictionary*). He takes charge of the commissions (in which he is associated with the judges), takes recognisances, records judgments and sentences, grants certificates of convictions, draws up orders, and, generally, his duties resemble those of a master (*q.v.*), or associate (*q.v.*). The qualification for the office is prescribed by the Clerks of Assize Act, 1869. He must have been in actual practice for three years, either as a barrister, special pleader, conveyancer, or solicitor, or he must have acted as a subordinate officer to a clerk of assize on circuit (s. 3). He is not allowed to practise on the circuit in which he acts. The appointment is made by the senior judge going the winter or summer assizes (s. 21, Judicature Act, 1884).

Clerk of the Peace.—See **PEACE, THE**.

Clifford's Inn.—See **INNS OF CHANCERY**.

Close Rolls.—The rolls in which close writs, private indentures, and recognisances are recorded, as distinguished from the patent rolls in which royal grants by letters patent of lands, honours, liberties, franchises, offices, and the like are recorded.

Close Writs, or *literæ clausæ*, are Crown writs under the Great Seal directed to particular persons for particular purposes, which, not being proper for public inspection, are closed up and sealed on the outside, so differing from letters patent (*literæ patentes*) (see **PATENTS**), which are exposed to open view, with the Great Seal pendent at the bottom, and which are usually directed to the subjects at large. The term also covers writs directed to the sheriff instead of to the lord (3 Reeve, *Hist. Eng. Law*, 45). Close writs are construed most beneficially for the Crown, unless made *ex speciali gratiâ, certa scientiâ, et mero motu reginæ*, when they will require a more liberal interpretation; as also they will when granted on valuable consideration.

Closure.—This word, as used in the Standing Orders of the House of Commons, is restricted in meaning to the conclusion of a pending debate.

In a wider sense, it may be understood to include limits set upon individual speech, or upon the discussion of a political topic.

As to individual speech, the Standing Orders deal—(1) With "disregard of the authority of the Chair, or wilful obstruction of the business of the House." The offender may be named by the Speaker, and thereupon suspended from the service of the House, on motion made and question put without amendment, adjournment, or debate, for one week on the first occasion, for a fortnight on the second, for a month on the third or any subsequent occasion (Standing Order 21, 28th Feb. 1880; 22nd Nov. 1882). (2) With "irrelevance or tedious repetition." The Speaker or Chairman may direct a member so offending to discontinue his speech (Standing Order 24, 27th Nov. 1882; 28th Feb. 1888).

The closure, in the sense of a curtailment of debate on a motion actually before the House, or of the time to be assigned to the stages of a bill, dates from 1881².

The celebrated forty-one hours' sitting, which commenced 31st January 1891, was ended by the summary action of Mr. Speaker Brand, who, stating that "under the operation of the accustomed rules and methods of procedure, the legislative powers of the House are paralysed," said that he was satisfied he should best carry out the wishes of the House if he put the question at once.

On the 3rd of February, Mr. Gladstone introduced the "Urgency" resolution, which, with some amendment, was passed the same day. A minister of the Crown might move that the state of public business was "urgent"; the Speaker must put this question without debate, and if it was carried by a majority of 3 to 1 in a House of not less than 300, the power of regulating the business of the House during urgency was intrusted to the Speaker (Hansard, 3rd series, vol. 257, p. 155). On the 3rd of February this resolution was carried, and the state of business declared to be urgent. On the 4th, the Speaker laid his regulations before the House, and these were later increased in stringency.

Under this rule of Urgency the bills for the Protection of Life and Property in Ireland (1881) and for the Prevention of Crime (1882) were carried through the House (Annual Register, 1882, p. 107).

In the autumn session, 1882, a Standing Order was made by which Mr. Speaker, or the chairman of a committee of the whole House might, if he saw that it was "the evident sense of the House that the question be now put," inform the House of this, and, on motion made to this effect, might put the question that the question should be put. If this were carried when the majority consisted of more than 200 or more, or the minority of less than 40, the question at issue was to be put without further debate.

In 1887 this rule was changed, and the present Standing Orders 25 and 26 passed. This gives the initiative in moving that "the question be now put" to any member; the motion may only be made when the Speaker or Chairman of Ways and Means is in the chair, and with his consent, and the number of those voting in the majority must not be less than 100.

There are two other modes of accelerating debate. One is provided by Order 25. A motion may be made (with assent of Speaker or Chairman) that a clause, or part of a clause, stand part of a bill. This, if carried, precludes amendments which may have been set down to the clause so carried (May, *Parl. Practice*, 10th ed., p. 214). The other is known as "closure by compartments," or "the guillotine." Orders are made by the House in reference to certain measures that debate on particular stages of them should be concluded by a given date. For instances, see Hansard, 3rd series, vol. 315, p. 1594 (Criminal Law (Ireland) Bill, 1887); 4th series, vol. 14, p. 373 (Government of Ireland Bill, 1893); vol. 27, p. 1401 (Evicted Tenants Bill, 1894).

Clubs.—*Constitution of Clubs.*—Clubs, so far as their constitution is concerned, may be divided into two classes—"Proprietary Clubs" and "Members' Clubs." The distinction is a fundamental one, determining the whole character of club membership. Of the two, the Proprietary Club is the older type. White's, Brooks', "The Thatched House," and other celebrated resorts were all proprietary clubs. The theory of such an institution is that the proprietor furnishes club premises and all accessories

in consideration of an entrance fee and annual subscription. The members are, in point of law, mere licensees, not co-owners. The proprietor is not unfrequently in these days a limited company formed to run a club as it would an hotel or a music hall. In the latter type of club—the “Members’ Club”—the members themselves constitute the club. A club of this kind when unincorporated is something *sui generis*. It is not a trading company—not being formed for the acquisition of gain within sec. 4 of the Companies Act, 1862 (*In re St. James’ Club*, 1855, 3 De G. M. & G. 389). It is not a partnership. It is not a mutual benefit society. It is an association of independent individuals deriving its sole cohesion (1) from the rules which bind the members together; (2) from a common user of the club premises and property; and (3) from some common bond of sympathy in politics, art, or sport, superadded to the social purposes of the club. It is very common now, however, to incorporate “members’ clubs,” and the most convenient way of doing so is as a company limited by guarantee. Capital is not required, the expenses being met by entrance fees and subscriptions. The name “Club,” “Society,” or “Association” can be used instead of company, and the Board of Trade can, under sec. 23 of the Companies Act, 1867, dispense with the use of the word “Limited” on being satisfied that the profits are to be applied in promoting the objects of the club and not in payment of dividends to the members. Incorporation carries with it the great advantages that the club can act, contract, sue, and be sued in its own name, and as a corollary therefrom that the committee and officers, being mere agents, incur no legal liability. Trustees can also be dispensed with. The working staff of a club, whether incorporated or unincorporated, is generally the same—a committee of members, a steward or manager, and a secretary.

Rules.—The constitution of the club is based upon its rules. These rules represent the terms of the contract entered into between the members. They define the powers of the committee, and they regulate the relations of the members *inter se*, their rights, duties, and privileges, so far as they can be regulated by rules as distinguished from the unwritten rules of good sense and gentlemanly feeling. A copy of the club rules is usually sent by the secretary to a member on his election, but no direct notice of this kind is necessary. If the rules of a club are contained in a book kept by the master of the club and accessible to the members, every member must be taken to be acquainted with them (*Ragget v. Musgrave*, 1827, 2 Car. & P. 556).

Expulsion of Members.—In a club’s rules the most important are those regulating the admission or expulsion of members—these being matters vitally affecting the comfort and credit of the club. Any member who brings himself by his conduct within the condemnation of the rules may be expelled in the manner provided by the rules, or in the absence of any express provision by the vote of a majority of the members (*Innes v. Wylie*, 1845, 1 Car. & Kir. 257); but in either case, whether the rules provide for it or not, a member whose conduct is impugned must have fair play. The committee must give him notice to answer the charge made against him, and an opportunity of defending himself (*Labouchere v. Earl of Wharfedale*, 1880, 13 Ch. D. 346; *Baird v. Wells*, 1890, 44 Ch. D. 661). The committee of a club, as Jessel, M. R., said in *Fisher v. Keane*, 1879, 11 Ch. D. 353, is a quasi-judicial tribunal, and must act as such. Expulsion from a club is a very serious matter. It may blast irretrievably the character and prospects of the member; and so regarding it the committee are bound to act upon the ordinary principles of justice. It is not, however, in every case that the Court has jurisdiction to interfere. The foundation of the jurisdiction

of the Court to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member, of which right he is deprived (*Rigby v. Carrol*, 1880, 14 Ch. D. 482; *Lyttleton v. Blackburn*, 1876, 45 L. J. Ch. 219). It is one thing, however, to say that the power of expulsion must be fairly exercised, and another to interfere with the discretion of the members *bona fide* exercised. The social character of a club is its most distinctive feature, and the members are the best persons to judge of what is injurious to the interests of the club (*Hopkinson v. Marquis of Exeter*, 1868, L. R. 5 Eq. 63). This principle of non-intervention has been illustrated in a number of cases. Thus in *Dawkins v. Antrobus*, 1881, 17 Ch. D. 615, the member sought to be expelled had sent a letter to S., a gentleman of high official position and a member of the club, with the words "Dishonourable conduct of S." written outside the envelope, and the Court refused to review the discretion of the committee expelling the offending member. Where the rules of a Conservative club provided for expulsion "in case any circumstance should occur likely to endanger the welfare and good order of the club," and a member had pledged himself to vote for certain Liberal candidates, it was held within the competence of a meeting to expel for such conduct, and the Court refused to interfere (*Hopkinson v. Marquis of Exeter*, 1867, L. R. 5 Eq. 63). Again, in *Lambert v. Addison*, 1882, 46 L. T. 20, where a member had spoken at the bar of the club of the club committee as a "pocket borough," and the committee had expelled him for publicly disparaging the committee before strangers and the club servants, being of opinion that he had, by doing so, acted injuriously to the character and interests of the club, the Court declined to interfere.

And see Wertheimer on *Clubs*, p. 45.

Retirement.—A member of a club may *prima facie* retire without the consent of the other members (*Finch v. Oake* [1896], 1 Ch. 409), but usually retirement is regulated by the rules and notice required.

Dissolution.—In the absence of special provisions as to dissolution, a dissolution may be agreed to by the members, and in such a case the property of the club is distributable equally among the members (*Brown v. Dale*, 1878, 9 Ch. D. 78).

Contracts by Clubs.—The question frequently arose with unincorporated clubs and still sometimes arises, whether the members of a club are liable to contribute to what are called the debts of the club. The law is now settled that no member of a club is liable to a creditor except so far as he has assented to the contract in respect of which such liability has arisen (*In re St. James' Club*, 1855, 2 De G. M. & G. 383, 389), for the members are not partners so as to be the agents of each other (*Fleming v. Hector*, 1836, 2 Mee. & W. 172). The usual course is to give the club committee authority to enter into contracts on behalf of the members of the club. They are then competent to bind the members, but as a joint authority of this kind would have to be exercised by all the members of the committee, the rules commonly authorise the committee to act by a quorum or to delegate their powers to a steward or sub-agent (*Todd v. Emly*, 1841, 8 Mee. & W. 505). Such quorum or sub-agent then becomes the agent of the members of the club, but apart from such authority (which it is for the wine merchant or butcher who has supplied the goods to prove (*Todd v. Emly, supra*)) an individual member of a club or a member of the committee of management not having in any way pledged his personal credit, is not personally liable for goods ordered for and supplied to the club as a whole (*Overton v. Hewett*, 1886, 3 T. L. R. 246; *Steele v. Gourley*, 1886, 3 T. L. R. 118, 669;

Stansfield v. Rideout, 1888, 5 T. L. R. 656; *Jones v. Hope*, 1886, 3 T. L. R. 264 n.).

Actions by and against Clubs.—An incorporated club, as a legal person, can sue and be sued, but an unincorporated club cannot. The members may, however, by the rules or by resolution authorise a person or persons to sue or defend on their behalf. In *Andrews v. Salmon* (W. N., 1888, 102) the Court expressly authorised the chairman and a member of the committee to represent the committee. Where a question arises between members of the club and the executive, a common and convenient course is for one member of the club to bring the action, suing "on behalf of himself and all other the members of the X. club," against the trustees and committee (*Harrison v. Marquis of Abergavenny*, 1886, 3 T. L. R. 324). See also *Renton Football Club v. McDowall* (18 Ct. Sess. Cas. 4th ser. 670).

Supply of Liquors.—In a proprietary club the proprietor cannot supply liquors to the members without a licence any more than an hotel-keeper could, but a "members' club" is different. This was judicially determined in the case of *Graff v. Evans*, 1881, 8 Q. B. D. 373. The theory of law in such a case is that when a member orders a bottle of champagne and pays for it, there is no "sale by retail" within sec. 3 of the Licensing Act, 1872, because the member is part owner of the bottle. What he does is not to buy the champagne, but to acquire on payment a release of the other members' rights in the bottle—an interesting example of the transmutation of a simple transaction when refracted through the medium of the legal mind. This principle has led to great abuse; clubs having been formed for the mere purpose of defeating the licensing laws. This question is now the subject of a parliamentary inquiry. In *Evans v. Hemingway* (1888, 52 J. P. 134) the magistrates found that a club of this kind, which was ostensibly a "members' club," was in reality "proprietary," and inflicted a heavy penalty.

Gaming at Clubs.—A word should be said as to gaming at clubs. Gaming may be unlawful by reason of the place in which it is carried on or by reason of the unlawfulness of the game itself (*Jenks v. Turpin*, 1883, 13 Q. B. D. 505, 513). If a club comes within the definition of a common gaming house—that is a house in which a large number of persons are invited habitually to congregate for the purpose of gaming—it is a common nuisance, and all play there, even at lawful games, is illegal. The club being limited to members does not prevent it being a gaming house, for the law does not say a *public* gaming house; it says a common gaming house. A man does not, however, by merely being a member of a club, assist in "conducting its business," so as to make him liable for keeping a common gaming house (*Jenks v. Turpin*, *supra*). Persons taken into custody in a common gaming house may be required to give recognisances not to haunt them any more. Without a club being a common gaming house, games may be played there which are in the eye of the law illegal. The unlawful games are ace of hearts, faro, basset, baccarat, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of mere skill.

Corporation Duty.—Clubs—members' clubs, that is to say, not proprietary clubs—are now liable to the corporation duty imposed by 48 & 49 Vict. c. 51. The liability is confined as a rule to (1) the annual value of the club premises if the freehold or leasehold interest is vested in the members; (2) the income derived from personal estate, such as interest received from money, money on deposit at a bank, or from any investment in Government or other securities. Gate money is chargeable.

Working Men's Clubs.—Working Men's Clubs are a species of friendly society, registered under the Friendly Societies Acts, 1875–1893, and governed by the provisions of those Acts. See FRIENDLY SOCIETIES. The Act of 1875 defines such clubs as “societies for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation.”

Coach.—See HACKNEY CARRIAGE; STAGE CARRIAGE. As to offences on, see VENUE.

Coach-House.—In the Criminal Law Consolidation Acts, 1861, it was deemed necessary to enumerate coach-houses among the structures in respect of which arson or riotous damage could be committed. See ARSON; MALICIOUS DAMAGE; RIOT.

Coadjutor.—See BISHOP; EXECUTORS AND ADMINISTRATORS.

Coal Mines.—Legislation for the regulation of coal mines has been experimental and progressive. The earliest Act was passed in 1842. It and others were repealed in 1872, and the code of 1872, as amended in 1886, was repealed and recodified in 1887. The statute passed in that year (50 & 51 Vict. c. 58) is now the basis of the law bearing on the subject; but it has been amended by subsequent Acts passed in 1894 (57 & 58 Vict. c. 52) and in 1896 (59 & 60 Vict. c. 43). The Acts apply to (a) coal mines, (b) mines of stratified ironstone, (c) mines of shale, and (d) mines of fireclay (Act of 1887, s. 3).

The scheme of the Acts is that (I.) inspectors are appointed, who, subject to the control of the Home Secretary, have great powers of seeing that all mines are properly worked, and of enforcing responsibility where this is not done: (II.) Mines must be under the immediate control of qualified managers, who have obtained certificates of fitness after proper experience and examination: (III.) Various acts and omissions are defined to be offences and punishable with fines (s. 59), or, in case the offence is reasonably calculated to endanger the safety of or cause serious personal injury to any person employed in or about the mine, with imprisonment (s. 60). In case the owner, agent, or manager of a mine is found guilty, the fine may be heavier than in the case of a workman; but proceedings cannot be instituted against the owner, etc., for an offence not committed by him personally, except by an inspector, or with the consent of the Home Secretary. An inspector shall not institute proceedings against an owner, agent, manager, or under-manager, if satisfied that he had taken all reasonable means to prevent the commission of the offence (s. 65). Proceedings are before a Court of summary jurisdiction, and there is an appeal to Quarter Sessions. (See APPEALS.) The other more important provisions of the Act relate (IV.) to the terms of employment; (V.) to protection of workpeople; (VI.) to the protection of the public; (VII.) to arbitration.

(I.) *Inspectors.*—Inspectors are appointed by the Home Secretary, who assigns their duties and the districts for which they are to act (s. 39). An inspector is empowered (1) to make such examination and inquiry as may be necessary to ascertain whether the provisions of the Act are complied with;

(2) to enter, inspect, and examine any mine at all reasonable times by day or night; (3) to inquire respecting the state and condition of any mine, its ventilation, the sufficiency of its special rules, and all matters and things relating to the safety of the persons employed, and the care and treatment of the horses and other animals used in the mine; (4) to carry the Act into effect (s. 41). He may also, by notice in writing, require the owner, agent, or manager of a mine to remedy anything, not dealt with by the Act or rules, which he considers to be dangerous or defective. The owner, agent, or manager may within ten days signify to the Home Secretary his objection to remedy the matter complained of in the notice, and thereupon its reasonableness is to be determined by arbitration. If he does not do so, or if the award supports the notice, it must be complied with (s. 42). Each inspector is required to make an annual report of his proceedings to the Home Secretary, to be laid before Parliament (s. 43).

(II.) *Managers*.—Every mine must be under a certified manager, responsible for its control, management, and direction. A mine, however, in which not more than thirty persons are employed below ground is exempt from this requirement, unless the inspector of the district requires it to be under the control of a manager (s. 20). The manager or a certified under-manager must exercise daily personal supervision of the mine (s. 21). No person can obtain a certificate as manager or under-manager, unless he has had practical experience in a mine for at least five years. The certificates are given after a local examination, in which regard is to be had to such knowledge as is necessary for the practical working of mines in the district where it is held, to every candidate who passes satisfactorily and gives satisfactory evidence of his sobriety, experience, ability, and general good conduct (ss. 23-26). On representation made by an inspector or otherwise, the Home Secretary may cause a public inquiry to be held by a Court named for the purpose, which Court may cancel or suspend the certificate of a manager or under-manager, if it finds that he is unfit to discharge his duty, by reason of incompetency or gross negligence, or of having been convicted of an offence against the Act (s. 27). The Home Secretary may at any time renew or restore a certificate which has been cancelled or suspended on such terms as he thinks fit (s. 29).

(III.) *Conditions of Employment*.—The Act protects young persons and females, and limits the conditions under which they may be employed.

Boys under twelve years of age, and girls and women, may not be employed below ground (s. 4). Boys between the ages of twelve and sixteen may not be employed below ground for more than ten hours in any day, or fifty-four in any week (s. 5). Above ground, no boy or girl under twelve years of age may be employed at all; between twelve and thirteen, the hours are limited; from thirteen to sixteen they may be fifty-four per week, but on Saturday afternoon or Sunday their work is forbidden. No boy, girl, or woman may be employed more than five hours continuously without an interval for meals (s. 7). There is at present no statutory limit to the hours of employment of adult males, that matter being left to arrangement between employer and employed.

Wages may not be paid at any house where fermented liquor is sold (s. 12). If wages are payable according to the amount of mineral gotten, payment is to be made according to the actual weight of the mineral contracted for; and the weighing must take place as near to the pit's mouth as is reasonably practicable. But contracts whereby the employers and employed agree that deductions may be made from the weight in respect of stones or substances other than the mineral contracted to be gotten, are expressly authorised

(s. 12). The meaning of these words has been much discussed; and it has been decided that mineral means the substance worked for, and that, for instance, in a coal mine deductions for slack or small coal are not allowable (*Brace v. Abercorn Colliery Co.* [1891], 1 Q. B. 496. See also *Netherseal Colliery Co. v. Bourne*, 1888, 14 App. Cas. 228; *Kearney v. Whitehaven Colliery Co.* [1893], 1 Q. B. 700).

The men may appoint a check-weigher of their own to take a correct account of the mineral or determine the deductions to be made. He is to have every facility for enabling him to fulfil his duties, but may not impede or interrupt the working of the mine or interfere with the weighing. If the owner, agent, or manager of the mine objects to the check-weigher appointed, on the ground of his interference or misconduct, the matter is to be heard before justices, who may make a summary order for removal of the man objected to, but without prejudice to the stationing of another check-weigher in his place (s. 13).

Persons not employed as coal or ironstone getters prior to 1887 may not be employed alone in the face of the workings until they have had two years' experience of such work under the supervision of skilled workmen (s. 49, r. 39). This requirement is intended no doubt as a security against accidents, but is of general application.

(IV.) *Protection of Workpeople from Injury.*—There must be at least two shafts or outlets with which every seam for the time being at work in a mine has access, so that such shafts may afford separate means of ingress and egress available to the persons employed in each such seam. Proper apparatus for raising and lowering persons at each such shaft must be kept constantly available for use (s. 16). Exceptions to this rule are permitted (a) in case of new mines being opened, so long as not more than twenty persons are employed below ground in connection with any single shaft; and (b) in other mines, so long as the mine is exempted by order of the Home Secretary (s. 18).

Where two or more parts of a mine are worked separately, each part may be deemed a separate mine, unless the Home Secretary objects, on the ground that the division tends to lead to evasion of the Act or otherwise to prevent the Act being carried into effect. If the owner, agent, or manager of the mine declines to acquiesce in such objection, the matter is to be determined by arbitration (s. 19).

In case of an explosion causing loss of life or any personal injury, or any accident causing loss of life or serious personal injury, the owner, agent, or manager must send notice to the inspector within twenty-four hours, specifying the character of the explosion or accident, and the number of persons injured (s. 35). The inspector has a right to notice of coroners' inquests on the bodies of persons whose death may have been caused by explosions or accidents in or about mines, and to be present and take part in such inquests. Relatives of any person whose death may have been so caused, the owner, agent, or manager of the mine in which the explosion or accident occurred, and any person appointed by the order in writing of the majority of the workmen employed in such mine, may also attend and examine witnesses (s. 48). An inspector may at any time be directed to make a special report with respect to an explosion or accident which has caused loss of life or injury to any person (s. 44). The Home Secretary may also order a formal investigation in open Court of any explosion or accident, and of its causes and circumstances. Such Court has all the powers of an inspector and of a Court of summary jurisdiction, and special powers to enter and inspect any place or building, to require the

attendance of witnesses and production of documents for the purpose of the investigation, and to require any person examined to sign a declaration of the truth of the statements made by him in his examination (s. 45).

General rules for working have been enacted (s. 49), which are to be observed as far as is reasonably practicable, having regard not to profitable working but to physical or engineering difficulties (*Wales v. Thomas*, 1886, 16 Q. B. D. 340). These rules provide (1) for ventilation; (2) all parts of the mine in which workmen are to pass or work must be inspected before and during each shift; (3) machinery in use must be inspected once every twenty-four hours, and shafts once every week; (4) the entrance of every place, not in actual use or course of working, must be securely fenced; (5) workpeople must be withdrawn from every part of a mine found to be in a dangerous condition; (6) naked lights are forbidden in any place where there is likely to be a dangerous quantity of inflammable gas; (7) safety lamps must be examined and locked before being taken into the workings. (8) The conditions regulating the use of explosives below ground are very strict. Explosives must not be stored in the mine, and may only be taken down in cartridges and in limited quantities; in places where safety lamps are required, or which are dry or dusty, no shot may be fired except under the direction of a competent person appointed for the purpose; if there is reason to suspect gas, the explosive must be of such a nature, and so used, that it cannot inflame the gas; so also if the place is dry or dusty, all contiguous accessible places must be watered, or else the explosive must be such that it cannot inflame gas or dust (rule 12). Special rules may also be made for these purposes, *vide infra*. (9) Special precautions are ordered in places likely to contain a dangerous accumulation of water. (10) Refuge holes must be provided in all underground roads to enable workpeople to avoid trucks, etc. Every travelling road in which a horse or other draught animal is used underground must be large enough to allow it to pass without rubbing the roof or timbering. (11) The top and all entrances to shafts must be kept securely fenced. (12) Shafts and the roof and sides of all roads and working places must be made secure, and where necessary lined or timbered. (13) Engines and machinery must be in charge of competent male persons. (14) Proper apparatus must be provided for all shafts used for drawing materials, or for lowering or raising persons. (15) All dangerous machinery must be kept securely fenced. (16) The workpeople may appoint two practical working miners to inspect the mine on their behalf once at least in every month, and report the result of their inspection. If the report state the existence or apprehended existence of any danger, a copy is to be sent to the inspector of the district.

Special rules are also to be established in every mine in order to prevent dangerous accidents and to provide for the safety, convenience, and proper discipline of the persons employed in or about the mine (s. 51). Such rules are to be framed by the owner, agent, or manager of the mine, and sent to the inspector of the district for approval by the Home Secretary. They become established if not objected to by him within forty days after their receipt by the inspector (s. 52), but may be modified. If the owner, manager, or agent objects to the proposed modification, the matter must be referred to arbitration, and the rules shall be established as settled by the award (s. 53). The rules may in like manner be from time to time modified or new rules established (s. 54).

The rules may be modified with respect specially to (a) the lights or lamps to be used in a mine; (b) the use of explosives; (c) the persons

permitted to remain whilst shots are fired; (d) the watering or efficient damping of the mine or any place therein; (e) precautions for the prevention of accidents from inflammable dust or coal dust. Special rules made for these purposes supersede any general rule or special rule under the principal Act, so far as it may be inconsistent with them (Act of 1896, s. 1).

An abstract of the provisions of the Act and copy of the special rules is to be posted in legible characters in some conspicuous place in or near the mine, and a printed copy is to be supplied to every person employed who applies for it (Act of 1887, s. 57). Every person who contravenes or fails to comply with any of the general or special rules is guilty of an offence. The owner, agent, and manager is also, each of them, guilty in the event of a contravention or non-compliance with any of the rules, unless he proves that he had taken all reasonable means by publishing, and, to the best of his power, enforcing the rules, so as to prevent contravention or non-compliance (ss. 50 and 51). An owner who took no part in the management was held by magistrates in one case to have done all that was required of him when rules were duly posted in the works and their enforcement was left to the manager, and this decision was approved by the High Court (*Baker v. Carter*, 1878, 3 Ex. D. 132). But an agent who, by the definition given in sec. 75, is a person appointed as the representative of the owner, and as such superior to the manager, has been held liable to conviction for an offence of which the manager was also guilty (*Wynne v. Forrester*, 1880, 5 C. P. D. 361).

(V.) *Protection of the Public.*—The owner, agent, or manager of every mine must send to the inspector of the district an annual return of the details of the workings (s. 33). He must also keep at the office of the mine an accurate plan of the workings up to a date not more than three months previously. Such plan must at any time be produced to the inspector, and the actual state of the workings shown (s. 34). The plan must show the position of the workings with regard to the surface, and the position, extension, and direction of every known fault or dislocation of the seam, with its vertical throw (Act of 1896, s. 6). When any mine or seam is abandoned, the owner must within three months send a plan to the Home Secretary to be preserved; but no person except an inspector is entitled to see such plan, without the consent of the owner or the licence of the Home Secretary, for a period of ten years after the abandonment (s. 4). Where a mine is or has been abandoned or the working discontinued, the owner, and every other person interested in the minerals, must cause the top of the shaft and every side entrance from the surface to be securely fenced, and kept fenced against accidents. Failure to comply with this provision is punishable as an offence against the Act. If, moreover, the unfenced shaft or entrance is within fifty yards of any highway, road, footpath, or place of public resort, or is in open or uninclosed land, it is to be deemed a nuisance, for which summary proceedings can be taken by the District Council under secs. 91–98 of the Public Health Act, 1875 (Act of 1887, s. 37). Notice of the commencement or recommencement of the working of a shaft or seam, or of its abandonment or discontinuance, must be given within two months to the inspector of the district (s. 36).

(VI.) *Arbitration.*—Many cases may occur in which differences may arise between the owners or managers of a mine and the inspector or Home Office as to the feasibility or desirability of suggested rules, etc. These differences are to be determined by arbitration, under conditions prescribed by the Act (s. 47). The parties are to be deemed to be the owner, agent, or manager on the one hand, and the inspector on the other. Each party may appoint an arbitrator, who must be a practical mining

engineer or person accustomed to the working of mines, not employed or interested in the mine to which the arbitration relates. If only one arbitrator is appointed, he is to act alone; if not, the two may determine the matter in difference; but if they differ, it must be determined by an umpire. The umpire is to be appointed by the arbitrators, or, in case of their neglect to do so, by the chairman of the Quarter Sessions within whose jurisdiction the mine is situate. The umpire must be a County Court judge or registrar, a stipendiary magistrate, or the recorder of a borough. The procedure would be in accordance with the Arbitration (*q.v.*) Act, 1889. Arrangements are, wherever practicable, to be made for the matter in difference being heard before the arbitrators and umpire together, so as to avoid two hearings. Besides examining the parties and their witnesses on oath, the arbitrators and umpire are expressly empowered to consult any counsel, engineer, or scientific person, if they deem it expedient to do so. The workpeople employed in the mine may appoint a person specially to represent them or a class of them on the arbitration, but must, if required, give security for payment of the costs so occasioned. The person so appointed may appear and take part in the proceedings (Act of 1896, s. 2).

The payment, if any, to be made to any arbitrator or umpire is to be fixed by the Home Secretary, and is, together with the costs, to be paid by the parties or one of them. Costs may be taxed by a Master of the High Court.

Coalition (in Diplomacy), an alliance between States for combined action. See **ALLIANCE**.

Coast, Vice-Admiral of the.—A judicial and ministerial officer of the Lord High Admiral (see **ADMIRAL**); now appointed by Letters Patent of the Sovereign, given in the High Court of Admiralty of England under the Great Seal. The office is generally conferred on some great nobleman, and takes precedence of the lord lieutenancy of a county. The seacoast of England and Wales is divided into nineteen circuits or vice-admiralties, viz.:—(1) Northumberland, Durham, and York, (2) Lincoln, (3) Norfolk, (4) Suffolk, (5) Essex, (6) Kent, (7) Sussex, (8) Southampton, (9) Dorset, (10) Devon, (11) South Cornwall, (12) North Cornwall, (13) Somerset, (14) Gloucester, (15) South Wales, (16) North Wales, (17) Chester, (18) Lancaster, (19) Westmoreland and Cumberland. Of these only six are at present filled, viz.:—Lincolnshire, Norfolk, Suffolk, Cornwall, North Wales and Carmarthen, Westmoreland and Cumberland. It is uncertain at what date the first formal appointment was made to the office; but if we may credit the *Black Book of the Admiralty* (*q.v.*), reciting the Ordinance made at Grimsby in the reign of Richard I., the Admiralty jurisdiction was then in full vigour, and carried out by the *lieutenants* of the admiral. In other passages they are described as *deputies* or as *commissaries*. "When one is made admiral," says the *Black Book* (vol. i. art. 1), "he must first ordain and substitute for his *lieutenants*, *deputies*, and other officers under him, some of the most loyal, wise, and discreet persons in the maritime law and ancient customs of the seas, which he can anywhere find." Again, by the Ordinance of Hastings in the reign of Edward I., "Any contract made between merchant and merchant, or merchant and mariner, beyond the sea, or within the flood-mark, shall be tried before the admiral and nowhere else." Neale (*Sea Laws*, p. 6), writing in 1704, says that the admiral "constitutes his *deputies*

for particular parts on the seacoasts, with *coroners* to view the dead bodies found on the sea or on the coasts." Two statutes, viz. 13 Rich. II. st. 1, c. 5, and 15 Rich. II. c. 3, endeavour to restrain the *deputies* of the admiral who "hold their sessions within divers places of this realm." The deputies, or vice-admirals, had jurisdiction on the seacoast and on the adjoining sea of their respective counties, and tried all offences not involving punishment of death or mayhem committed within their jurisdiction. By special warrant they might try these offences also. They adjudicated on all contracts between mariners and merchants, subject to an appeal to the High Court of Admiralty. They held their Courts (called Water Courts) on the seashore within the flood-mark, or on quays, or on the banks of navigable rivers where the tide ebbed and flowed. By custom they sometimes held their Courts, for convenience of suitors, within the body of the county, where they also obtained, what is known of, as an *accidental* jurisdiction, whereby they could serve citations or empanel a jury there. Their procedure followed the rules of the civil, not of the common, law. The emblem of their jurisdiction was a silver oar. The power to appoint Admiralty coroners is specially reserved to the Crown by the Coroners Act, 1887. The Crown sometimes granted an Admiralty jurisdiction to a manor or borough. In Scotland there are at present vice-admirals for the West Coast and for the Orkney and Shetland Isles. There is a vice-admiral for each of the four provinces of Ireland; and in the sixteenth century for our North American Provinces.

Coaster.—The coasting trade of the United Kingdom was entirely restricted to British ships from 1562 (5 Eliz. c. 5, s. 7) till 1854, when foreign ships were admitted to it on the same terms as British ships (17 & 18 Vict. c. 5). The present law on this subject is contained in the Customs Act of 1876, 39 & 40 Vict. c. 36, which reproduces the provisions of the earlier statutes of 1854 and 1855 (18 & 19 Vict. c. 96) to the same effect: "All trade by sea from any one part of the United Kingdom to any other part thereof shall be deemed to be a coasting trade, and all ships while employed therein shall be deemed to be coasting ships, and no part of the United Kingdom, however situated with regard to any other part, shall be deemed in law with reference to each other to be parts beyond the seas; and if any doubt shall at any time arise as to what or to or from what parts of the coast of the United Kingdom shall be deemed a passage by sea, the Commissioners of the Treasury may determine and direct in what cases the trade by water from one port or place in the United Kingdom to another of the same shall or shall not be deemed a trade by sea within the meaning of this or any Act relating to the Customs (s. 140). Every foreign ship proceeding either with cargo or passengers or in ballast on any voyage from one part of the United Kingdom to another, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man, to the United Kingdom, or from the United Kingdom to any of the said islands, or from any of the said islands to any other of them, or from any part of any of the said islands to any other part of the same, shall be subject as to stores for the use of the crew, and in all other respects to the same laws, rules, and regulations to which British ships when so employed are now subject; but no such foreign ship nor any goods carried therein shall, during the time she is so employed, be subject to any higher or other rate of dock, pier, harbour, light, pilotage, tonnage, or other dues, duties, tolls, rates, or other charges whatsoever, or to any other rules as to the employment of pilots, or any

other rules or restrictions whatsoever than British ships employed in like manner or goods carried therein . . . (s. 141). No goods shall be carried in a coasting ship except such as shall be laden to be carried coastwise at some port or place in the United Kingdom, . . . and if any goods shall be taken into or put out of any coasting ship at sea or over the sea, or if any coasting ship shall touch at any place over the sea or deviate from her voyage, unless forced by unavoidable circumstances, or if the master of any coasting ship which shall have touched at any place over the sea shall not declare the same in writing under his hand to the collector or other proper officer at the port in the United Kingdom where such ship shall afterwards first arrive, the master of such ship shall forfeit the sum of £100" (s. 142, amended by 47 & 48 Vict. c. 62, s. 2, which repealed the omitted words of this section, and provided that vessels with inward cargo for more than one port may convey goods not entitled to drawback or liable to duty coastwise). Proper times and places for landing and shipping goods for a coastwise voyage are appointed, under penalty of the master forfeiting £50 (s. 143, amended by 44 Vict. c. 12, s. 10). The master of every coasting vessel must keep a cargo book, stating the names of the ship, master, the port of destination, and the port to which the ship belongs, and, unless the Commissioners of Customs otherwise direct, must enter the name of every port of loading and the goods there taken on board the ship, under a penalty of £20 (s. 144, reproduced in s. 9 of the Customs Act, 1879, 42 & 43 Vict. c. 21). Before leaving the port of lading the master must sign the clearance of the ship for the voyage, and the transire or pass for the goods, under penalty of £20, from the Customs officer, who takes a copy of it, and the Commissioners may allow general transires to be given; transires are to be delivered to the proper Customs officer within twenty-four hours of the ship's arrival at a port of discharge; and goods from the Isle of Man, either grown or produced there, or manufactured from the growth or produce there, or materials not subject to duty in the United Kingdom or on which the duty has been paid in the United Kingdom, may not be unladen till a certificate of their origin from the Customs officer at the port of shipment is given to the officer at the port of discharge, under penalty of a fine or forfeiture of goods (ss. 145, 146). Customs officers may board and examine any coasting ship and her cargo (s. 147); and goods brought coastwise may be entered for a voyage outwards beyond the seas without being landed (s. 148).

Ships engaged in the coasting trade are exempt from compulsory pilotage (M. S. A., ss. 603 (1) and 625 (1)). Under similar provisions in the Acts of 1826 (6 Geo. IV. c. 125, s. 59) and 1854 (17 & 18 Vict. c. 104, ss. 353 and 379), it has been held that the ship must be one that is constantly engaged in the coasting trade; and thus a ship which is ordinarily employed in foreign trade, though, in fact, engaged in the coasting trade, is not entitled to this exception (*The Agricola*, 1843, 2 Rob. W. 10, where the ship had made a voyage from Calcutta to London, and had discharged all her cargo there, and then proceeded from London to Liverpool in ballast; *The Lloyds or Sea Queen*, 1863, Br. and L. 159, where the ship, though usually engaged in foreign trade, was in the course of a voyage from Liverpool to London with a cargo shipped at the former, and to be delivered at the latter port). These decisions of Dr. Lushington were recently affirmed and followed in *The Winstead* ([1895], Prob. 170, Bruce, J.), where a vessel employed in trading between London, Cardiff, and Venice, which took in some cargo at London for Venice, intending to fill up with cargo at Cardiff and discharge her ballast there,

was held to be a foreign going ship while on the voyage from London to Cardiff. See PILOT.

British ships engaged in the coasting trade are subject to the general duties and liabilities of British ships (see BRITISH SHIP), with the following exceptions:—"Ships not exceeding 15 tons burthen, employed solely in navigation on the rivers or coasts of the United Kingdom, or of some British possession, within which the managing owners of the ships are resident," are exempted from being registered (s. 3 (1) of M. S. A., 1894). "Ships of less than 80 tons registered tonnage, exclusively employed in trading between different ports on the coasts of the United Kingdom," need not have the statutory form of agreement between the master and crew (s. 113). No certificates of competency are required from persons in charge of coasting vessels (s. 92 ff.). The regulations respecting the supply of medicines and medical stores required for other ships do not apply to coasters (s. 200). Coasters under 80 tons need not have deck lines or a load line marked upon them (ss. 437, 438), but if over that tonnage they must have a load line just like other ships (s. 441).

Coastguard.—Historically the origin of coastguard service is to be found in two distinct sources, viz. protecting the country from invasion and securing the revenue derived from customs; and actually at the present time the coastguard combines both these duties.

In early times the defence of the English coast was provided by the maritime counties, which "even under Edward I. (*i.e.* in the thirteenth century) were liable for the charges of defending the coast, and found the wages of the coastguard. The coastguard of each county was under the command of a knight as *major custos*, constable, or chief warden" (such as the warden of the Cinque Ports or the constable of Dover) (Stubbs, *Const. Hist.* ii. 310). The Cinque Ports and other maritime towns were bound for a similar reason to find ships for the Royal fleet; and this seems to be the origin of the claim to demand ship money, which was finally rejected in the time of Charles I. When the feudal tenures were abolished in 1660, the defence of the kingdom devolved upon the newly organised militia; and no special measures were taken for guarding the coast from that time till 1857, when the present system began.

From early times a service of customs officers existed, for the purpose of enforcing the customs duties; and a regular force of revenue cruisers and watch stations on the coast was formed under the control of the Commissioners of Customs, to perform this duty. About the beginning of the present century a "coast blockade" was instituted on the shores of Kent and Sussex, commanded by naval officers, and subject to naval discipline; and a chain of "blockade stations" was made along the coast, the then existing Martello Towers being utilised for the purpose. At the same time the old revenue cutter service was largely developed, and "a preventive water-guard" established generally under the command of naval officers all round the coasts of the kingdom. In 1820 a statute gave the Treasury power to survey and mark out lands on the coast for watch-houses for the protection of the revenue (1 Geo. iv. c. 43, s. 4). In 1822 an order of the Treasury consolidated into one force "the revenue cruisers, the preventive water-guard, and the riding officers" under the Board of Customs, by the name of the Preventive Service, the executive command being vested in a comptroller-general, who was a captain in the navy. The "riding officers" were a mounted force of men, dating from 1698, when 300 riding officers

were appointed for the patrol of the coast; and dragoons and regular cavalry were employed in it. In 1829 the official name of the force was changed to the "revenue coastguard"; and in instructions issued by the comptroller-general in that year that name is adopted, the riding officers are called the "mounted guard, to be selected from the cavalry regiments by the general commanding in chief," and the sole object of the force is stated to be the protection of the revenue. In 1831, by Treasury minute, the appointment of the coastguard officers and men was transferred to the Admiralty, and only crews of ships and war and revenue cruisers were admitted to the service; and the "coast blockade" was given up. In 1845 it was proposed to use the crews of coastguard stations for the defence of the coast; and in 1853, in consequence of the report of a commission of naval officers appointed by the Admiralty, it was decided by Order in Council, and then by Act of Parliament, that the coastguard should be liable upon emergency to be called on to serve in the fleet, and to be subject to naval discipline while so serving, and that a body of naval coast volunteers, with a maximum of 10,000 men, should be established (O. in C., April 1, 1853, 16 & 17 Vict. c. 73). During the Crimean War the coastguard were largely employed afloat; and in 1857 the whole service was transferred from the Customs Commissioners to the Admiralty (19 & 20 Vict. c. 83).

This Act, which is entitled one "to provide for the better defence of the coasts of the realm and the more ready manning of the navy, and to transfer to the Admiralty the government of the coastguard," enacts that after an order from the Treasury the Commissioners of the Admiralty should raise and maintain a number of officers and men (not to exceed at any one time 10,000 in number), who shall form the coastguard, and shall exercise over them all the powers and control hitherto exercised over the existing coastguard (s. 3). Lands held for the existing coastguard service are to be vested in the Commissioners of the Admiralty, who are also empowered to acquire lands for coastguard stations, and succeed to the rights in that respect of the Customs Commissioners contained in 16 & 17 Vict. c. 107, ss. 336-345 (ss. 4, 5). All powers, rights, and privileges, etc., of the existing coastguard are to vest in the new force (s. 6), which is to have certain privileges as regards pay enjoyed by officers and men in the navy (s. 7); while all coastguards borne on the books of vessels of war are to be subject to the same laws and customs with respect to discipline as persons serving in the fleet (s. 8). Coastguard officers were also empowered to train, exercise, and instruct the naval coast volunteers (s. 10). The Act is made applicable to the Channel Islands and the Isle of Man (s. 11). The coastguard is thus now part of the navy, and acts both as a naval reserve, superintended by an admiral, under whose command all the coastguard forces in the United Kingdom are placed, as well as a force for protecting the revenue; and under the Customs Acts they have duties and liabilities, rewards and protections with regard to preventing smuggling (1876, 39 & 40 Vict. c. 36, ss. 169-217, and 259-274; 1881, 44 & 45 Vict. c. 12, s. 12). Coastguard officers may also act as British sea-fishery officers, under the North Sea Fisheries and Liquor Traffic Conventions between Great Britain and France and other Powers (1843, 6 & 7 Vict. c. 79; 1883, 46 & 47 Vict. c. 22; 1888, 51 & 52 Vict. c. 18); they may hold preliminary inquiries into shipping casualties on or near the coasts of the United Kingdom (M. S. A., 1894, s. 465), and may exercise the powers of receivers of wreck in the absence of the latter (s. 516). Coastguards may claim salvage remuneration for watching or protecting shipwrecked property according to a scale fixed by the Board of Trade

(s. 568); or as salvors for saving property (*The London Merchant*, 1837, 3 Hag. 394); for "though their primary duty is (was?) to prevent smuggling, it is also to assist vessels in distress, and it is a duty to be paid for" (Dr. Lushington, *The Silver Bullion*, 1854, 2 Spinks, 74, and so *The Amazon*, 1860, 2 L. T. 140); but they are not entitled to salvage for merely going on board a vessel in distress for revenue purposes (*The Queen Mab*, 1835, 3 Hag. 243). Books containing the entries made by the coastguard, and sent to the Coastguard Office, have been admitted in evidence in the Admiralty Court to prove the state of wind and weather at a particular time without calling the person who made them (*The Catherina Maria*, 1866, L. R. 1 Ad. & Ec. 53).

[See *Shore, Smuggling Days*, 1892; *Parliamentary Papers*, 1853 (Naval).]

Code Napoleon.—Under this name are often understood the five codes, the Civil Code (1804), Code of Civil Procedure (1806), Code of Commerce (1807), Code of Criminal Procedure (1808), and Penal Code (1810), adopted in France during the first Napoleonic régime. In 1807 the Emperor altered the title of these from *Code Civil des français* to *Code Napoleon*, but at the restoration of the legitimate dynasty the title became *Code Civil* simply, and thereafter the practice grew up of using the term *Code Napoleon* as a short description of the whole of French codified law. In France itself, at the present day, *Les Cinq Codes* has become the commoner term for this purpose.

The codes were introduced by Napoleon into the countries forming his empire, and during his short sway they became so popular that many were retained after all connection with France had ceased. Among these countries were Belgium, Holland, Italy, and the Rhine provinces. Belgium has kept the old Civil Code almost unchanged to the present day. See CIVIL LAW.

Codicil.—1. In the earlier English writers the term codicil was used in a sense resembling that which it had in Roman law, as meaning an informal testamentary instrument not necessarily dependent on a will. Since the Wills Act it has come to mean in ordinary parlance a testamentary instrument altering or modifying a will. Notwithstanding this meaning, however, a codicil may take effect without a will, if no will is forthcoming, though language is used in the codicil which implies the existence of a will (*Black v. Jobling*, 1869, L. R. 1 P. & M. 685; *Gardiner v. Courthope*, 1886, 12 P. D. 14; *In bonis Clements* [1892], Prob. 254).

The better opinion appears to be that where a will is shown to have existed with a codicil, and the will is afterwards revoked, the codicil is not revoked, though some of the earlier cases decide the contrary (see cases *supra*, and *Grimwood v. Cozens*, 1860, 2 Sw. & Tr. 364; *In bonis Dutton*, 1863, 3 Sw. & Tr. 66).

2. A testamentary instrument described as a codicil to a particular will or referring to the provisions of the will, republishes the will and makes it speak as of the date of the codicil.

But a testamentary instrument not expressed to be a codicil to the will, and not referring to the will, has not the effect of republishing the will (*In re Smith, Bilke v. Roper*, 1890, 45 Ch. D. 632).

• 3. A codicil may also have the effect not only of republishing the will so as to make it speak as of the date of the codicil, but of incorporating and making valid testamentary instruments which are invalid or have been revoked.

A codicil confirming a prior will and codicils *prima facie* confirms only a valid will and codicils (*Croker v. Marquis of Hertford*, 1844, 4 Moo. P. C. 339; *Haynes v. Hill*, 1849, 1 Rob. Eccl. 795).

But such a confirmation may have the effect of incorporating invalid testamentary instruments if it is necessary to do so in order to satisfy the reference in the codicil (*Aaron v. Aaron*, 1849, 3 De G. & Sm. 475; *Allen v. Maddock*, 1858, 11 Moo. P. C. 427).

Thus a document described as a codicil to the last will of a testator without further reference makes valid an invalid will, if that is the only document answering the description of a last will, but the description of a codicil as a fourth codicil may not be sufficient to incorporate an unattested third codicil (*Stockil v. Punshon*, 1880, 6 P. D. 9; *In bonis Heathcote*, 1881, 6 P. D. 30).

Reference to a will in general terms includes all the instruments, both will and codicils, which constitute the will, unless the testator distinguishes between his will and codicils (*Farrar v. St. Catharine's College, Cambridge*, 1873, L. R. 16 Eq. 19).

So when there is a valid will and invalid codicils a subsequent codicil referring to the will by date and confirming it will not confirm the invalid codicils (*Burton v. Newbery*, 1875, 1 Ch. D. 234).

4. Where a will is revoked by a later will, and the testator then makes a codicil, which is expressed to be a codicil to the revoked will, referring to it by date or in some other way, the revoked will is revived (*In bonis Stedham*, 1881, 6 P. D. 205).

But in such cases if there is anything to show that the reference to the revoked will is a misdescription, for instance if the revoked will is called the last will, when it is not in fact the last will, the reference to the date may be rejected and the revoked will is not revived (*In bonis Steele*, 1868, L. R. 1 P. & M. 575; *In bonis Ince*, 1877, 2 P. D. 111).

A mere reference in a codicil to a revoked testamentary instrument will not revive it; it must be referred to in terms which show an intention to revive it (*In bonis Dennis* [1891], Prob. 326).

If the revoked will has been actually destroyed it cannot be revived by codicil (*Hale v. Tokelore*, 1850, 2 Rob. Eccl. 318; *Rogers v. Goodenough*, 1862, 2 Sw. & Tr. 342).

The fact that a codicil is found attached to a revoked will by tape, or that a memorandum not described as a codicil is written on the back of an invalid will, will not revive or incorporate the will (*Marsh v. Marsh*, 1860, 1 Sw. & Tr. 528; *In bonis Drummond*, 1860, 2 Sw. & Tr. 8; *In bonis Tovey*, 1878, 47 L. J. P. 63).

5. A codicil confirming a will, whether referred to as of a particular date or not, confirms the will as altered by intermediate codicils, unless there is some intention shown to revive portions of the will which have been revoked by intermediate codicils (*Green v. Tribe*, 1878, 9 Ch. D. 231; *McLeod v. McNab* [1891], App. Cas. 471).

6. A codicil which revives a revoked will by referring to it by date, does not thereby revoke a subsequent will which revoked the revived will (*In bonis Stedham*, 1881, 6 P. D. 205).

7. A gift by will to an attesting witness becomes valid if the will is confirmed by a codicil, but not if the attesting witness also attests the codicil (*Anderson v. Anderson*, 1872, L. R. 13 Eq. 381; *In re Marcus, Marcus v. Marcus*, 1887, 57 L. T. 399).

8. A Court of Probate will inquire whether two codicils closely resembling each other were both intended to take effect, and an inference

as to the intention may be drawn from the contents of the documents (*Chichester v. Quatrefages* [1895], Prob. 186).

In a court of construction no evidence of the testator's intention is admissible to show that two similar codicils were intended to be substitutionary, or that one was only meant as a duplicate.

Where there are two codicils of different dates, which are substantially copies of each other, with certain differences, the rule is that the legacies given by the later instrument are cumulative and not in substitution for legacies given to the same persons by the earlier instrument (*Wilson v. O'Leary*, 1872, L. R. 7 Ch. 448).

Where two codicils are executed at the same time, which are in all respects identical, the presumption apparently is that one is only intended to be a duplicate of the other, and the evidence of the attesting witness is admissible to show that they were intended to be duplicates (*Whyte v. Whyte*, 1873, L. R. 17 Eq. 50; *Hubbard v. Alexander*, 1876, 3 Ch. D. 738).

9. A legacy given by codicil in addition to or in substitution for a legacy by the will, even though not expressed to be in addition or substitution, is, as a general rule, subject to the same incidents as the legacy given by the will; for instance, it will be payable out of the same fund, and at the same time, it will be free from legacy duty if the original legacy was given free from duty, and it will be subject to the provisions affecting the original legacy as regards separate use and the like (*Crowder v. Clowes*, 1794, 2 Ves. Jun. 449; *Earl of Shaftesbury v. Duke of Marlborough*, 1835, 7 Sim. 237; *Day v. Croft*, 1842, 4 Beav. 561; *Johnston v. Earl of Harrowby*, 1859, 1 De G. F. & J. 183; *In re Benyon, Benyon v. Griere*, 1884, 51 L. T. 116; *In re Boddington, Boddington v. Clairat*, 1884, 25 Ch. D. 685; *In re Colyer, Millikin v. Snelling*, 1886, 55 L. T. 344).

But an additional or substituted legacy given by codicil will not, if given absolutely, be subject to the gifts over and limitations of the original legacy (*In re More's Trust*, 1852, 10 Ha. 171; *Munn v. Fuller*, 1884, Kay, 624). See also INCORPORATION; REVOCATION; and Theobald on *Wills*.

Codification.—Bentham is responsible for the invention of the word "codification," or at all events for its introduction into the English language (Murray's *Dictionary*, s.v.). We are therefore bound to ask what meaning he himself attached to the term. The answer is to be found in his *General View of a Complete Code of Laws* (published in French by Dumont, 1802, Bowring's edition, vol. iii. p. 157). The object of a code is that everyone may consult the law of which he stands in need, in the least possible time (p. 193). "Citizen," says the legislator, "what is your condition? Are you a father? Open the chapter 'Of Fathers.' Are you an agriculturist? Consult the chapter 'Of Agriculture.'" "A complete digest, such is the first rule. Whatever is not in the code of laws ought not to be law" (p. 205). "The great utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten" (p. 207). Its style should be characterised by force, harmony, and nobleness. "With this view, the legislator might sprinkle here and there moral sentences, provided they were very short, and in accordance with the subject, and he would not do ill if he were to allow marks of his paternal tenderness to flow down upon his paper, as proof of the benevolence which guides his pen" (p. 208). "A code framed upon these principles would not require schools for its explanation, would not require assistants to

unravel its subtleties. It would speak a language familiar to everybody; each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness. The father of a family, without assistance, might take it in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals" (p. 209). The code having been prepared, the introduction of all unwritten law should be forbidden. Judges should not make new law. Commentaries, if written, should not be cited. "If a judge or advocate thinks he sees an error or omission, let him certify his opinion to the Legislature, with the reasons of his opinion and the correction he would propose" (p. 210). "Finally, once in a hundred years, let the laws be revised for the sake of changing such terms and expressions as by that time may have become obsolete" (*ibid.*).

In short, the code was to be complete and self-sufficing, and was not to be developed, supplemented, or modified except by legislative enactment.

These views were characteristic of the age in which Bentham wrote. It was an age of great ideals. It underrated the difficulties of carrying them into execution. It overrated the powers of government. It broke violently with the past. It was deficient in the sense of the importance of history and of historical knowledge. It aimed at finality, and made insufficient allowance for the operation of natural growth and change. It forgot Bacon's maxim that *subtilitas naturæ subtilitatem artis multis partibus superat*. It ignored or underestimated differences caused by race, climate, religion, physical, social, and economical conditions.

If Bentham was the chief apostle of codification at the beginning of the present century, Savigny was its chief opponent. His famous work, *vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, "On the Vocation of our Time for Codification and Jurisprudence," was published in 1814 as a counterblast to Thibaut's pamphlet of the same year, *über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*, "On the Necessity of a General Civil Code for Germany." Both works were due to the revival of German patriotism, caused by the Napoleonic wars. Thibaut urged his countrymen to promote German unity by codifying and unifying their laws. Savigny warned them against hastily and inconsiderately following foreign models. According to him, Germany did not yet possess either the scientific knowledge or the scientific terminology requisite for codification. Moreover, the models proposed for adoption were marred by serious defects. They had been hastily put together; their authors had only a superficial knowledge of the subjects with which they dealt; they were full of blunders and defects. (Savigny afterwards admitted that his criticisms on French jurisprudence were overcharged. Preface to second edition, 1828.) Although Savigny's plea was primarily for delay, yet it is clear that he was opposed to codification on principle. His desire was that law should be gradually developed by the silent internal forces of national consciousness, with the least possible interference by the Legislature. He would have abolished the hateful French codes in those parts of Germany into which they had been introduced. Where there were in existence national codes—as in Prussia and Austria—he would not abolish them, but he would, by means of scientific and especially of historical study, bring them back into close organic relation with the common law. Everywhere he would circumscribe the functions of the Legislature in the field of private law, and would confine its activity, as far as possible, to the clearing up of doubts and the

authoritative declaration of customs. (See Dr. Behrend's *Essay in Holtzendorff's Encyclopädie der Rechtswissenschaft*.)

Bentham and Savigny were both giants. To each of them half his prayer was granted, whilst the other half has been scattered to the winds.

Bentham is the greatest of English law reformers. He fulminated even more against the practical than against the formal defects of English law, and it is not an exaggeration to say that of the changes which have transformed both the substance and the administration of English law since his time, the majority are due more or less directly to his suggestions. His efforts for improving the form of law have been less completely realised. "Bentham," wrote J. S. Mill in 1838, "demonstrated the necessity and practicability of codification, or the conversion of all law into a written and systematically arranged code." In truth, he demonstrated neither the one nor the other. What he did was to set up an ideal towards which legislation should tend, an ideal which has been materially modified by subsequent reflection and experience, but which has profoundly influenced the thought and action of lawyers and legislators since his time. He has not shown the necessity, but he has shown the utility, of codification. By his own unsuccessful experiments, he went far to demonstrate the impracticability of codification, *in the sense which he attached to the term*. We no longer believe either in the practicability or in the desirability of a code which shall be complete and self-sufficing, which shall absolve from the necessity of researches into the case law or statute law of the past, which shall preclude the judicial development of law in the future, and which shall provide a simple rule applicable to every case with which the practical man may have to deal. We know that legal rules and legal expressions cannot be severed from their roots in the past. We know that enacted law is most useful if confined to the statement of general principles, and that the more it descends into details, the more likely it is to commit blunders, to hamper action, and to cramp development. We know that the chief practical difficulty of the lawyer and the judge is not the apprehension of principles, but the application of principles to facts, and that the best constructed code cannot remove this difficulty. But we have also learned, and mainly through Bentham's teaching, that many of the difficulties of law are due to confusion of thought, to obscurity of expression, to want of orderly arrangement, and the lessons have borne fruit both in our statute-book and in our legal text-books.

In one part of the British Empire Bentham has exercised a more direct influence on the form of legislation. James Mill was a devoted disciple of Bentham. He was examiner of Indian correspondence when Macaulay was sent out with instructions to draw up a code or codes for British India; and it is to the pen of James Mill that is attributed by tradition the despatch in which those instructions were emphasised and developed. Macaulay's Penal Code, after a long slumber in pigeon-holes, and subsequent revision by experts, became law in 1860, and was followed by the other well-known Indian codes. These codes have sometimes been unwisely praised. They are not, and do not profess to be, models of the kind of codes required or suitable for a country like England. But they are excellent examples of the kind of codes suitable for unprofessional judges and magistrates, and they illustrate the mode in which, and the extent to which, Bentham's principles can be applied to practical needs.

Savigny was the founder of historical jurisprudence. He was the first to insist on, and to illustrate by his writings and research, the importance

of the historical treatment of law, and has thereby revolutionised the science of law. His services in this respect, both to his country and to the world at large, have been incalculable. But the practical question raised by the controversy between him and Thibaut has been answered, on the whole, in favour of the latter. Savigny exaggerated the theoretical defects in existing codes, and underrated their practical utility. He ignored Bentham's half-truth that "he who has been least successful in the composition of a code has conferred an immense benefit." He pushed too far the familiar argument that codification checks the natural growth of the law and arrests its development. He overrated the ability and willingness of what he called the "national consciousness," meaning thereby, practically, the legal profession, to effect legal reforms and adapt law to the requirements of the day without the assistance or compulsion of the Legislature. And lastly, he underrated the forces which were making for codification in Germany. The German people were struggling towards national unity; national unity meant unity of law, and unity of law could not be brought about without codification. The teachings of Savigny and the historical school have given Germans the knowledge and training requisite for the production of a scientific code; their warnings have not deterred Germany from following the path of codification. After many partial codes, the year 1896 has given Germany the general civil code for which Thibaut asked in 1814.

In Bentham's own country codification has found less favour and made less progress than on the continent of Europe.

Lord Westbury, when Lord Chancellor, meditated a general digest of English law. With this view a Royal Commission was issued in the autumn of 1866 to Lords Cranworth, Westbury, and Cairns, Sir T. P. Wilde, Mr. Lowe, Vice-Chancellor Wood, Sir George Bowyer, Sir Roundell Palmer, Sir J. G. Lefevre, Sir T. E. May, Mr. Daniel, Mr. Thring, and Mr. Reilly "to inquire into the expediency of a digest of law, and the best mode of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions." The Commission presented their first and only report on May 13, 1867. They employed certain barristers to prepare specimen digests, but the specimens prepared were not considered satisfactory, and no further steps were taken to continue the work.

In the next decade, Sir James FitzJames Stephen, fresh from his codifying labours in India, where he had passed into law a Criminal Procedure Code, an Evidence Act, and a Contract Act, made vigorous endeavours to adapt his Indian models to English uses. He drew a bill for codifying the English law of evidence, which was introduced into Parliament, but did not advance beyond a first reading. His draft Code of Criminal Law and Procedure was a more ambitious project. After having been introduced into Parliament by Sir John Holker in 1878, it was referred for revision to a Commission consisting of the draftsman and three other judges, who presented their report and draft code in 1879. The part of it which related to procedure was introduced as a Government measure in 1882, and was the first subject referred to the Grand Committee on Law which was set up experimentally in that year. After a few sittings, in which small progress was made, the bill was abandoned. Some of the proposed changes of procedure, which, in disregard of tactical considerations, had been placed in the forefront of the measure, excited parliamentary opposition, and, from the point of view of technical accuracy, other provisions of the bill were open to criticism. The failure of the measure gave a check

to the cause of codification in England. It confirmed the indisposition of Parliament to take codifying measures on trust, even when backed by the highest legal authorities. And it confirmed the doubts of experts, whether the kind of codification which had been found suitable for India would also suffice for England. But the drafts have produced results. If Stephen's Criminal Code failed to find a place in the English statute-book, his digests of English Criminal Law and Criminal Procedure are, and seem likely to remain, the best guides to those subjects which can be obtained either by the English or by the foreign student.

The term Codification is sometimes employed loosely so as to include Consolidation of Statutes (*q.v.*). But in its stricter and narrower sense it means an orderly and authoritative statement of the leading rules of law on a given subject, whether those rules are to be found in statute law or in common law. Of codifying measures in this narrower sense, three only have up to this date been passed by Parliament: the Partnership Act, 1890, 53 & 54 Vict. c. 90, which was drawn by Sir Frederick Pollock; the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, and the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, both of which were drawn by Mr. Chalmers, now Law Member of the Council of the Governor-General of India. A bill to codify the law of marine insurance, also drawn by Mr. Chalmers, has been introduced by Lord Herschell, but has not yet become law.

Such having been the fate of codification in England, it may be worth while to inquire why it has been more successful elsewhere, and to see what practical lessons may be drawn from the experiments and failures of the century which has elapsed since Bentham wrote.

Some of those lessons have been summarised above. On the one hand, we have learned that the most familiar argument against codification, namely, that it checks the natural growth of the law and hinders its free development, though it may apply to bad, does not apply to good, codification. No country has studied law, both historically and systematically, with more fruitful results than Germany. In no country has codification been more successful. Nor is there reason to apprehend that the German codes will arrest the progress of German law, whether in the form of judicial development or of legislative amendment. On the contrary, the scientific formulation of existing rules, provided the mistake is not made of attempting to stereotype details, illustrates and brings into prominence their defects, and thus stimulates their judicial development, and suggests and facilitates legislative amendments. The chief reason why so many of the statutory amendments of the English common law have been unsatisfactory in form and in effect is that they necessarily take the form of exceptions from indefinite or imperfectly formulated rules. If the rules were formulated, their statutory modifications would fit more easily and naturally into the general system, instead of being awkward excrescences, which tend to embarrass the Courts in their application and development of general principles, and are consequently regarded with jealousy and suspicion by the judges.

On the other hand, we have learned to form a more modest conception of what codification can effect, and to realise more clearly the difficulties which it involves, especially in countries which have already an advanced system of jurisprudence. Those difficulties are so serious as to deter any prudent Legislature from attempting the task, except under strong pressure from practical needs. In British India administrative exigencies led to the enactment of codes suitable to, and sufficient for, the requirements of the situation. For African protectorates and other places under consular

jurisdiction similar exigencies have been met by more rudimentary codes framed under the authority of the Foreign Jurisdiction Acts. On the continent of Europe the requisite motive power for codification has been supplied by the strong impulses which have made for national unity, and by the practical inconveniences arising from the co-existence of different systems of law in a country under the same political government. The gravity of those practical inconveniences in Germany is well illustrated by a paper recently contributed by Mr. Schuster to the *Law Quarterly Review* (vol. xii. pp. 17-34). In other words, the strongest motive power for codification on the Continent has been, not the desire to improve the form of the law, but the desire to make it more uniform by removing unnecessary and inconvenient local differences. But that motive does not exist in England. Our Norman, Angevin, and Plantagenet sovereigns, the first William, the second Henry, the first Edward, by establishing a strong central government and strong central Courts of justice, gave greater national and legal unity to England than was possessed by any Continental State until the present century. Under the steady and continual pressure of the Legislature and of the superior Courts, local differences of customary law have been almost obliterated. The common law of England is the common law of Ireland also. It is true that the common law of Scotland is different, but most of the practical inconveniences arising from the co-existence of two systems of law in the same island have been smoothed away by the gradual assimilation of various branches of law, especially of commercial law. The differences which remain are mostly in those branches of the law, such as the law of marriage and the law of real property, which are the most difficult to touch, and usually the last to yield to the levelling hand of the law reformer. In England, up to this time, the only effective demand for codification has proceeded from the commercial classes, and arises in the region of commercial law, where, owing to its cosmopolitan character, the need for the formulation of simple and generally intelligible rules, and for the removal of local differences, is more strongly felt than in other branches of the law. Professional lawyers, as a rule, take no interest in the question. Their indifference is largely due to the defective and haphazard system of English legal education, under which the student is usually left to pick up odd fragments of knowledge in Court or in barristers' chambers, and is rarely compelled or urged to take any general or scientific view of the principles which he has to apply. What is needed to supply the motive power and the material for codification in England is the improvement of legal education, and the concomitant improvement of legal text-books. If there is truth in Bentham's dictum, that "he who has been least successful in the composition of a code has conferred an immense benefit," it is more true that he who has written a good text-book has gone half-way towards framing a code. A good text-book has often been the foundation of a code, and in the meantime is not a bad substitute. See Professor Holland's *Form of the Law*.

Coercion.—In civil matters, coercion, compulsion, or duress is recognised as a ground for invalidating a will, deed, or contract. In criminal law, a distinction is drawn between coercion as physical compulsion and coercion as moral compulsion, *i.e.* overpowering influence by threats, duress of imprisonment, undue influence by persons in authority, or influence even by assault.

Acts which would otherwise amount to crime are excused, *i.e.* deprived

of their criminal quality, if done under physical subjection to the power of others, and not as the result of uncontrolled free action of a person's own. But the excuse is narrowly limited to cases where the circumstances are such that the will of the coerced was really and absolutely so constrained or under a compulsion that he becomes a mere innocent instrument of crime (*R. v. Dudley*, 1884, 14 Q. B. D. 273), and does not extend to excuse offences committed by a child or servant under the command of parent or master, the command being unlawful.

To the general rule there is one exception, that where a wife commits a felony in the presence of her husband, she has been presumed to be acting under his compulsion and treated as his innocent instrument.

The origin of the notion is explained on the ground that, when men had benefit of clergy (*q.v.*) and women had not, it seemed too harsh to condemn the wife to death and release the husband; and with respect to larceny cases, on the ground that the wife was entitled to assume that, if her husband told her to take a thing, it was his own property. But for complete explanation resort must also be had to the old doctrines of subjection to marital authority, which put a wife *in manu* or *in potestate viri*.

The nature and limits of the doctrine have been much canvassed and its abolition advocated. It is said to be confined to felonies, and it has been doubted whether it applies to all felonies; and the decisions are in some cases curious. In an anonymous case (cited in *R. v. Alison*, 1838, 8 Car. & P. 423), *e.g.*, husband and wife agreed to commit suicide together, he succeeded, and she was tried for murder, but acquitted on the ground of coercion. This doctrine was denied as to murder, but admitted as to burglary and all larcenies in 1664 (*R. v. Wharton*, 1664, 10 Kel. 37). The doctrine was again controverted as to murder (*R. v. Squire*, 1799, 1 Russ. on Crimes, 6th ed., 151); but established as to sending threatening letters, in *R. v. Hammond*, 1787, 1 Leach, 447; as to forgery, in *R. v. Hughes*, 1813, 2 Lew. C. C.; as to felonious assaults, in *R. v. Smith*, 1848, D. & B. C. C. 553; and as to robbery, *R. v. Torpey*, 1871, 12 Cox, C. C. 45. Although doubts have been expressed whether the presumption applies to all felonies, there seems no ground in law for any distinction, and it is enough to point out that with the character of the felony the presumption against independent action by the wife may be strengthened or weakened. There are some cases in which the doctrine seems to have been applied to misdemeanours, *e.g.* as to uttering counterfeit coin (see COIN, BRITISH) (*R. v. Conolly*, 1829, 2 Lew. 229; *R. v. Price*, 1837, 8 Car. & P. 20); but they are inconsistent with *R. v. Cruse*, 1838, 8 Car. & P. 536, where all the judges were consulted.

Careful examination of the cases shows the judgment to be full of unsound dicta, one for instance resting the presumption on service (*R. v. Squire*, 1799, 1 Russ. on Crimes, 6th ed., 151). The rule at best amounts only to a presumption, which may be rebutted by evidence of independent action or even of active participation (*R. v. Torpey*, 1871, 12 Cox, C. C. 48); and the husband and wife may be jointly indicted, and the jury are free to return a verdict that the wife acted independently of her husband, which will support her conviction (*R. v. Cohen*, 1868, 11 Cox, C. C. 99; *R. v. John*, 1875, 13 Cox, C. C. 100; *R. v. Dykes*, 1885, 15 Cox, C. C. 771). The questions now left to juries in these cases are—(1) Were the husband and wife guilty or not guilty? (2) If the wife is guilty, did she act under the coercion or compulsion of her husband?

The rule has been wholly or partially abrogated in some of the colonies,

e.g. by the Criminal Code of New Zealand, a case under which on this subject is now reserved for advice by the Judicial Committee of the Privy Council.

[Hereon see Stephen, *Dig. Crim. Law*, 5th ed., 23, 24; 1 Russ. on *Crimes*, 6th ed., 146.]

Coffee.—*Customs and Excise.*—Coffee is subject to an import duty of 14s. per cwt. if raw, or of 2d. per lb. if kiln-dried, roasted, or ground. A drawback is allowed on all roasted coffee exported as ships' stores equal in amount to the import duty on raw coffee (39 & 40 Vict. c. 35, s. 1). Imitations of coffee or coffee mixtures are subject to an excise duty of $\frac{1}{2}$ d. per $\frac{1}{4}$ lb. denoted by an adhesive label (45 & 46 Vict. c. 41, s. 5).

The importation of extracts, essences, or other concentrations of coffee, or any admixture thereof, is forbidden, except in transit or to warehouses for exportation (39 & 40 Vict. c. 36, s. 42).

Sale.—Besides the general provisions of the Sale of Food and Drugs Acts, which affect coffee as well as other articles of food (see ADULTERATION), there are several enactments dealing with particular modes of adulterating coffee.

Persons who, in or after roasting coffee, use water, grease, butter, or any other material which will increase the weight of the coffee or damnify or prejudice its goodness, are liable to forfeit £20 for each such offence (5 Geo. I. c. 11, s. 23). By 11 Geo. I. c. 30, s. 9, the penalty was increased to £100, with a slight difference in the definition of the offence. Traders or dealers in coffee who knowingly buy or sell such coffee are liable to like penalties (5 Geo. I. c. 11, s. 23; 11 Geo. I. c. 30, s. 9). Under the Act of 1719 the penalties are recoverable by action by common informer, and go half to the Crown, half to the informer. Under that of 1725 they are recovered like excise penalties, *i.e.* now under the Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21, s. 40. The Acts appear to have been extended to Ireland by 9 Geo. IV. c. 44, s. 4. Until 1867 sellers of or dealers in coffee were required to make entry of their premises for Inland Revenue purposes; but this fetter on trade was removed by 30 & 31 Vict. c. 90, s. 8.

In 1882 (45 & 46 Vict. c. 41, ss. 6, 7), regulations were made imposing conditions under which alone imitations of coffee and coffee mixtures can be sold. The sale must be in packets of $\frac{1}{4}$ lb., each labelled with a duty stamp, and with a statement of the substances of which the packet consists. These provisions do not affect the Food and Drugs Acts (45 & 46 Vict. c. 41, s. 6).

There have been several decisions on the sale of coffee mixed with other substances which have enlarged the liberty of the seller as to such admixture. In *Horder v. Meddings*, 1880, 44 J. P. 234, sale of a mixture containing only 15 per cent. of coffee with a label that it was a mixture, of which label the buyer had full notice, was not an offence against sec. 8 of the Act of 1875 (38 & 39 Vict. c. 63), in the absence of evidence of the fraudulent use of the chicory (*q.v.*) (85 per cent.) to increase bulk; see also *Higgins v. Hall*, 1887, 51 J. P. 293; and a like ruling was given as to sale of a mixture labelled French coffee containing 40 per cent. only of coffee (*Otter v. Edgley*, 1893, 57 J. P. 457).

Coffee House.—See HOUSE TAX; REFRESHMENT HOUSE.

Cognisance, Judicial.—Matters of which the Courts take judicial cognisance require no proof, although they are not formally admitted. They include matters of law and of fact.

1. *Law*.—The judges notice judicially the whole of the English law, whether common law, equity, admiralty, ecclesiastical, or statute law. Also the rules and practice of the superior Courts (whilst judges of inferior Courts recognise the procedure of their Courts), and such rules as are made under statutory authority and are to be judicially noticed, *e.g.* the Bankruptcy Rules (46 & 47 Vict. c. 52, s. 127), and such mercantile customs as have been proved before the Courts so clearly or so often as to have become part of the law merchant, and as such recognised without further proof (*Lohre v. Aitchison*, 1878, 3 Q. B. D. 562; *Ex parte Powell*, 1875, 1 Ch. D. 506). So also the calendar, weights and measures, and monetary system are regulated by statute, and are noticed as matters of law (24 Geo. II. c. 23; 41 & 42 Vict. c. 49; 33 & 34 Vict. c. 10; *Holkin v. Cooke*, 1791, 4 T. R. 314; *Kearney v. King*, 1819, 2 Barn. & Ald. 303).

2. *Fact*.—Public matters affecting the government of the country and territorial and geographical divisions of the country are perhaps as much matters of law as of fact, and are judicially noticed (*R. v. St. Maurice*, 1851, 16 Q. B. 908; 20 L. J. M. C. 221; 15 Jur. 559); so are wars in which this country is engaged (*R. v. De Berenger*, 1814, 3 M. & S. 67; 15 R. R. 415); the names of the occupants of the great offices of State, and the appointments of the judges and other judicial officers (*R. v. Jones*, 1809, 2 Camp. 131; 11 R. R. 680; *Howell v. Wilkins*, 1828, 7 Barn. & Cress. 783); the sessions of Parliament (*R. v. Wilde*, 1682, 1 Lev. 296); and the accession and death of the sovereign (*Holman v. Burrow*, 1702, 2 Raym. (Ld.) 794); and all other public matters directly concerning the general government of the country (Stephen, *Evidence*, Art. 58).

At common law the Courts took judicial notice of the Great Seal and the official seals of many public offices and departments, and there are a great variety of matters of which the Courts are directed by particular statutes to take judicial notice. These chiefly relate to the authentication of documents of a public character, such as the signatures of the judges of the Supreme Court when attached or appended to any decree, order, or certificate, or other judicial or official document (8 & 9 Vict. c. 113, s. 2).

Among matters of pure fact are many matters of common and certain knowledge, such as that a man cannot be the natural father of a child if he has not had access to the woman till within a fortnight of the birth (*R. v. Luffe*, 1807, 8 East, 193; 9 R. R. 406; and compare *Bosville v. A.-G.*, 1887, 12 P. D. 177; 56 L. J. P. 97; 36 W. R. 79); and matters of history, such as that the value of money has changed since the time of Richard I. (*Bryant v. Foot*, 1868, L. R. 3 Q. B. 497; 37 L. J. Q. B. 217). The Court takes judicial notice of the meaning of ordinary words of the English language (see *Hoare v. Silverlock*, 1848, 6 Q. B. 624), and of the natural and artificial divisions of time (Stephen, *Evidence*, Art. 58; see Best on *Evidence*, American note to 8th ed., p. 253; Taylor on *Evidence*, 9th ed., ss. 4–21; Wills on *Evidence*, p. 16).

Cognovit Actionem.—A written confession by a defendant of his liability in an action brought against him, usually made conditionally upon the giving of time for payment or other like consideration, coupled with an express or implied authority to take the necessary steps to enter up judgment, or, in other words, with a warrant of attorney for

that purpose.' It is subject to the same stamp duty as a mortgage (Stamp Act, 1891, 54 & 55 Vict. c. 39, sched.).

It is void unless attested by a solicitor, and the original or a copy filed within twenty-one days after execution, for which a fee of one shilling is charged, and unless the defeasance (*q.v.*) or condition, if any, is written on the same paper as the *cognovit actionem* (3 Geo. IV. c. 39, ss. 1-4; 32 & 33 Vict. c. 62, ss. 24-27). When the conditions are satisfied, a memorandum of satisfaction must be entered on the original or on a copy (3 Geo. IV. c. 39, s. 8).

A register of *cognovits* is kept in the Queen's Bench Division of the High Court of Justice (under 3 & 4 Geo. IV. c. 39, ss. 5-7, and 6 & 7 Vict. c. 66), and provision made for searches and taking office copies. The fee for inspection is one shilling (6 & 7 Vict. c. 66). A *cognovit* can be proved by an examined or office copy, on proof of the defendant's signature to the original (*Scott v. Lewis*, 1836, 7 Car. & P. 349).

Acknowledgment of a *cognovit* in the name of another, without lawful authority or excuse, is a form of false personation, and is also a felony under sec. 34 of the Forgery Act, 1861, 24 & 25 Vict. c. 98.

Since 1869, *cognovit actionem* is in practice superseded by judges' order by consent to enter up judgment or issue execution at a future time, which is subject to the above rules as to filing, etc. (32 & 33 Vict. c. 62, ss. 24-28).

Coif.—The white skull-cap originally worn by serjeants-at law as their distinctive head-dress. It now survives only as a white patch on the wigs of those of Her Majesty's judges who, having been appointed prior to the Judicature Acts, had first to take the degree of serjeant-at-law, viz. Esher, M. R.; Pollock, B.; and Lindley, L. J. See Pulling, *Order of the Coif*; and see BLACK CAP; SERJEANT-AT-LAW.

Coin, British.—1. The coining and legitimation of money is the exclusive prerogative of the Crown, but it has from the earliest times been both asserted and regulated by Acts of Parliament. Sterling money, *i.e.* gold and silver money, of a given weight and fineness, seems to have been first established in 1351 by 25 Edw. III. st. 5, c. 13; but for a long time after that date the Crown exercised, or, as Blackstone says (1 *Com.* 278), usurped, as part of its prerogative the right to debase the coin. And it was not until the time of Charles II. (18 & 19 Chas. II. c. 5) that the currency was put on a comparatively sound footing. The standard and value of the English coin was extended to Scotland, 1706 (6 Anne, c. 11, art. xvi.), which put an end, except for the calculation of old feu-duties, etc., to the old Scottish currency, which appears to have been derived from Holland or the Hanseatic towns. The Act of 1708 (7 Anne, c. 21) as to high treason in Scotland seems to have had the effect of making offences against the English coin treason in that country too.

Prior to 1870 the coinage and management of the mint were regulated by a series of enactments, wholly or partly repealed by and specified in the Coinage Act, 1870, 33 & 34 Vict. c. 10, on which the regulation of coin of the realm and the colonies now mainly depends.

That Act fixes the standard of coins (s. 3, sched. 1), and prohibits the issue, except from the mint, of any piece of metal as token or coin, under a penalty of £20, recoverable summarily (s. 5), and directs all contracts to be

made in currency (s. 6). It also regulates the purchase and coining of gold bullion (ss. 8, 9), and directs mint profits to be paid into the Exchequer (s. 10). The exercise of the prerogative of coinage is defined and controlled, but the powers are left very wide (s. 11).

The purity of the coinage and its conformity to standard is ascertained annually by the trial of the pyx (s. 12), which is held under an Order in Council of 1871 (St. R. & O., Rev., vol. i. p. 623). At this trial a jury of six competent freemen of the Goldsmiths' Company examine coins of each minting, set apart for testing by the standard trial plates and standard weights, which are kept in the custody of the Board of Trade (Act, ss. 16, 17) and produced on notice for the occasion. See ASSAY.

The Chancellor of the Exchequer is master of the mint, which is managed and regulated by the Treasury, subject to secs. 13, 14, 15 of the Act of 1870. •

Current Coin.—The only gold coin now current in England is that coined during the present reign at the London mint or the Australian branch mints. Pre-Victorian gold was decreed by proclamation in 1890 (St. R. & O., 1890, 227). The designs current are those of 1838, 1870, 1887, and 1893. Pre-Victorian gold has been called in in several colonies; in Australasia and in New Zealand in 1890 (St. R. & O., 1890); in the Cape and Fiji in 1893 (St. R. & O., 1893, pp. 48, 49).

Silver.—All silver coin coined since 1816 is still current and legal tender. The designs now legally current are those of 1817 (St. R. & O., Rev., vol. i. pp. 597, 599); 1821 (St. R. & O., Rev., vol. i. pp. 601-604); 1831 (St. R. & O., Rev., vol. i. pp. 604-606); 1838 (St. R. & O., Rev., vol. i. pp. 607-610); 1887 (St. R. & O., Rev., vol. i. pp. 619-622); and 1893 (St. R. & O., 1893, p. 45). Besides this general currency, in 1849 florins were made current coin (St. R. & O., Rev., vol. i. p. 612). The design was altered in 1852 (St. R. & O., Rev., vol. i. p. 613), and double florins were made current under the proclamation of 1887.

Copper and Bronze.—Until 1861 copper coins of the face value of 1d., $\frac{1}{2}$ d., and $\frac{1}{4}$ d. were coined as part of the currency. They were then superseded by bronze money of the same denominations (St. R. & O., Rev., vol. i. p. 614), and the copper coinage was decreed as to the United Kingdom in 1869 (St. R. & O., Rev., vol. i. p. 617), and as to all colonies in which they were current in 1876 (St. R. & O., Rev., vol. viii. p. 617). The designs adopted in 1861 were superseded by a new design in 1895 (St. R. & O., 1895, p. 40).

Legal Tender.—All coin current under proclamation, whether British, foreign, or colonial, is legal tender. In the United Kingdom, British gold coin is legal tender for any amount unless light; British silver up to 40s. and British bronze up to 1s. (Coinage Act, 1870, s. 4).

The rules as to the amount for which British coin is legal tender in a colony vary according to the colony (see Chalmers on *Colonial Currency, passim*). In Australasia and New Zealand it is the same as in the United Kingdom by an Order of 1896 (St. R. & O., 1896, p. 13). The same is true of the Cape of Good Hope and Natal (St. R. & O., Rev., vol. i. p. 627) and Fiji (St. R. & O., Rev., vol. i. p. 629).

No coin is legal tender which is defaced by any name or word being stamped thereon (24 & 25 Vict. c. 99, ss. 16, 17; 33 & 34 Vict. c. 7, s. 10).

Light Coin.—Great efforts are made to maintain, not only the standard of the coinage on issue, but also the weight and intrinsic value of gold coin in circulation under the Coinage Act, 1870. Where tender for payment is made in coin which is decreed or below the current weight, the

recipient is to cut, break, or deface it, and the person tendering it is to bear the loss (s. 7); the coin not being legal tender for its face value (s. 4). Weights for determining the weight of coins tendered are made according to standards prepared and verified by the Board of Trade, under the Weights and Measures Act, 1878, 41 & 42 Vict. c. 49. The standard coin weights are now those prescribed by Board of Trade Order of 1870 (St. R. & O., Rev., vol. viii. p. 120), and the least current weight of gold coin is also specified in that order. The fees for verification are prescribed by a Board of Trade Order of 1879 (St. R. & O., Rev., vol. viii. p. 138), and the limits of error allowed in local standards of coin weight by a like Order of 1882 (St. R. & O., Rev., vol. viii. pp. 134-138). The Act of 1870 contained a schedule (1) of remedy allowances for light coin, which was wholly superseded by that contained in the Coinage Act, 1892, 54 & 55 Vict. c. 72, which is to be printed instead of the old schedule in future copies of the Act of 1870.

Under the Coinage Act, 1889, 52 & 53 Vict. c. 58, in order to maintain the integrity of the gold coinage (s. 1), authority was given by Order in Council to exchange at their face value all pre-Victorian gold coins not previously called in by proclamation, which are below the least current weight and have not been illegally dealt with, *i.e.* impaired, diminished, or lightened otherwise than by fair wear and tear, or defaced by a name, number, word, or device stamped thereon. If a coin is over 4 grains under standard weight, the burden of proof that it has not been illegally dealt with is thrown on the person presenting it for exchange. Orders in Council were made under this Act on Dec. 13, 1889, and Feb. 8, 1890, and ultimately, by proclamation of Nov. 22, 1890, all pre-Victorian gold coin has ceased to be current (St. R. & O., 1890, p. 225).

Under the Coinage Act, 1891, similar provisions to those of 1889 were made as to exchanging at their face value all light gold coin not decreed. The limit of fair wear under this Act is 3 grains (s. 1 (3)). An Order in Council under this Act was made in 1892 (St. R. & O., 1892, p. 40), and in 1893 (by 56 Vict. c. 1) further provision was made for defraying the expenses of carrying out the Act. Light gold coin in the colonies is also being withdrawn under these Acts by Orders in Council.

Offences as to Coin.—Counterfeiting sterling coin was made high treason by the Treason Act, 1351, 25 Edw. III. st. 5, c. 2, whether the coin was or was not uttered (3 Co. Inst. 16; Hawk., P. C., bk. i. c. 2, ss. 54-89). This was extended to foreign coin current in England (by 1 Mary, sess. 2, c. 6), and by legislation of Elizabeth, William III., and George II. the penalties of treason were extended to persons who clipped, washed, coloured, filed, impressed, falsified, diminished, or marked the edges of current coin (5 Eliz. c. 11; 18 Eliz. c. 1; 8 & 9 Will. III. c. 26; 15 & 16 Geo. II. c. 28; 24 & 25 Vict. c. 99; 33 & 34 Vict. c. 10, ss. 5, 17, coin-weight standards; and 46 & 47 Vict. c. 45). The counterfeiting of copper coin, which was not sterling, did not fall within these penalties, but was made felony in 1771 (11 Geo. III. c. 40; and see 1 Hale, P. C. 211).

The uttering of false money on agreement made before the counterfeiting (1 Hale, P. C. 214) was high treason, but in other cases only a cheat and an indictable misdemeanour, but not bailable (3 Edw. I. c. 15) until made felony by 15 Geo. II. c. 28; and the possession of counterfeit coin with intent to utter it was not a criminal offence at common law (see 1 Russ. on Crimes, 6th ed., p. 198). The counterfeiting of gold or silver coin not current was misprision of treason (14 Eliz. c. 3). Most of these enactments contained a limitation of the time for prosecution, but did not require the

evidence of two witnesses: and as no corruption of blood was worked by conviction for most of these forms of treason (*Fost. Cr. Law*, 226), they were not tried under the Treason Act, 1695, 7 & 8 Will. III. c. 3; and the County Juries Act, 1825, 6 Geo. IV. c. 50, s. 21, in giving the right to a list of the petty jurors in treason cases, expressly excepts high treason by counterfeiting His Majesty's coin, and offences triable in the same way as that form of treason.

By Acts of 1832 (2 & 3 Will. IV. c. 34), 1853 (16 & 17 Vict. c. 102), and 1859 (22 & 23 Vict. c. 38), the old classification of offences against the coin, and the Acts which created it, were swept away, and a new classification created; and the old Acts on the subject, enumerated in the preamble of the Act of 1832, were by that Act repealed.

The legislation of this century is now consolidated for the whole of the United Kingdom in the Coinage Offences Act, 1861, 24 & 25 Vict. c. 99, which also includes the substance of Acts of 1777 (37 Geo. III. c. 126) and 1803 (43 Geo. III. c. 139) as to counterfeiting foreign coin not current in England. (See COIN, FOREIGN.) The offences under the Act of 1861 are all indictable, with one exception. The definitions follow those of the prior Acts, with additions and modifications, in consequence of judicial rulings. Very few rulings have been given on the Act of 1861.

Counterfeiting and Diminishing.—Under the Act of 1861, the following felonies may be committed with respect to the Queen's current gold and silver coin, *i.e.* any gold and silver coin coined in any of Her Majesty's mints (at home or in the colonies), or lawfully current by proclamation or otherwise (including foreign coin so current) in any part of Her Majesty's dominions (24 & 25 Vict. c. 99, s. 1):—

- (a) Falsely making or counterfeiting any coin resembling, or intended to resemble, or pass for, such current coin (s. 2).
- (b) Gilding, silvering, or washing, casing over, or colouring with materials capable of producing the appearance of gold or silver, any coin resembling, or intended to resemble or pass as such current coin, or gilding, silvering, or by any means whatsoever washing, casing, or colouring any piece of metal of a fit size or figure to be coined, with intent to coin it into false and counterfeit coin within (a) (s. 3).
- (c) Gilding or washing, casing over or colouring by any means whatsoever, or filing or altering any current silver coin, with intent to make it resemble or pass as current gold coin (s. 3). This was often done with the sixpences of the 1887 design, which in design closely resembled half sovereigns.
- (d) Gilding or silvering, or washing, casing over, or colouring by any means whatsoever, any current bronze coin, or filing or altering such coin with intent to make it resemble or pass as current gold or silver coin (s. 3). This process is said to be applied to farthings of the latest design, which resemble half sovereigns.
- (e) Impairing, diminishing, or lightening current gold and silver coin, with intent to pass it as current coin (s. 4).
- (f) Unlawful possession of filings, clippings, or gold or silver bullion, or gold or silver in dust or solution, or otherwise produced or obtained by the commission of offence (e) with knowledge that that offence was committed (s. 5).
- (g) Without lawful authority or excuse, buying, selling, receiving, paying, or putting off false or counterfeit coin at less than its face value (s. 6).

- (h) Making without lawful authority or excuse, or selling any medal, cast, coin, or other like thing of whatever material resembling current gold or silver coin, or having a device like that on such coin, or so formed that it can be gilded, worked, etc., into the semblance of current coin (46 & 47 Vict. c. 45). This Act was directed formerly against what were called Hanoverian medals.

Of these offences (a), (b), (c), (d), and (g) are punishable by penal servitude for life, or not less than three years (24 & 25 Vict. c. 99, ss. 2, 3, 6; 54 & 55 Vict. c. 69, s. 1); (e) is punishable by penal servitude from three to fourteen years, and (f) by penal servitude from three to seven years (24 & 25 Vict. c. 99, ss. 4, 5; 54 & 55 Vict. c. 69, s. 1). In all cases as an alternative the offender may be imprisoned with or without hard labour for not over two years (54 & 55 Vict. c. 69, s. 1). Offence (h) is punishable by imprisonment with or without hard labour for not over one year.

With respect to current coin of copper, bronze, or base metal, the following misdemeanours may be committed:—

- (a) Counterfeiting such coin (s. 14).
- (b) Buying, selling, receiving, paying, or putting off below its face value any such coin, or offering to do so.

These offences are punishable by penal servitude from three to seven years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 99, ss. 14, 38), and also or alternatively by fine and (or) being bound over with or without sureties for good behaviour.

Import and Export.—Under sec. 42 of the Customs Consolidation Act, 1876, 39 & 40 Vict. c. 36, it is forbidden to import false money or counterfeit sterling or silver coin of the realm, or any money purporting to be such, which is not of the established standard in weight or fineness. If imported it is forfeited by the Customs authorities and may be destroyed. By sec. 2 of the Customs Amendment Act, 1886, 48 & 49 Vict. c. 41, this provision is extended to any coin coined in a foreign country specified in a Royal Proclamation. At present foreign coin other than gold or silver is excluded from importation by a proclamation of 1887 (St. R. & O., Rev., vol. i. p. 623). And under sec. 2 of the Revenue Act, 1889, 52 & 53 Vict. c. 42, the prohibition on importation is extended to all imitation coins as therein defined, except in those cases in which the Commissioners of Customs permit importation, on the ground that the importation is for a lawful purpose, or the imitation is not likely to circulate as current coin.

Besides these enactments it is felony to import or receive into the United Kingdom from beyond the seas (i.e. a foreign country) any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing it to be false or counterfeit. The offender is not guilty if he can prove lawful authority or excuse for the importation. The punishment is penal servitude for life, or not less than three years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 99, s. 7; 54 & 55 Vict. c. 69, s. 1). Originally these offences were high treason (25 Edw. III. st. 5, c. 2; 1 & 2 Ph. & M. c. 11, s. 2; 14 Eliz. c. 3).

Exportation of counterfeit current coin of the realm is a misdemeanour punishable by imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 99, s. 8). The offence was originally created in 1798 (38 Geo. III. c. 67), but was abolished, probably by inadvertence, in 1825 by a Customs Act (6 Geo. IV. c. 105) (see Greaves, *Crim. Law Consolidation Acts*, 324).

Uttering.—The following misdemeanours may be committed with respect to the circulation of counterfeit coin :—

- (a) Knowingly tendering, uttering, or putting off any counterfeit coin resembling, or meant to pass as, current gold and silver coin (s. 9).
- (b) Committing offence (a) and being found in possession of any other counterfeit coin of the same kind, on the day of committing offence (a) or within ten days next thereafter being guilty of a second like uttering (s. 10).
- (c) Knowingly having in custody or possession three or more pieces of such counterfeit coin with intent to utter them (s. 11).
- (d) Knowingly uttering foreign coin not current here, or medals, etc., resembling current gold or silver coin, with intent to defraud (s. 13), and see *R. v. Robertson*, 1865, L. & C. 604.
- (e) Knowingly uttering, etc., counterfeit copper or bronze coin; and
- (f) Knowingly uttering counterfeit coin resembling or meant to pass as that of a foreign prince or state (s. 20).

The punishment for these offences is imprisonment with or without hard labour—in the case of offence (f) for not over six months; of offences (a), (d), and (e), for not over one year; and in the case of offences (b) and (c) for not over two years. Persons convicted after a previous conviction of offences (a), (b), or (c) are guilty of felony and liable to imprisonment for not over two years or penal servitude from three to seven years (24 & 25 Vict. c. 99, s. 12). "Conviction" in this case means a verdict or plea of guilty (*R. v. Blaby* [1894], 2 Q. B. 170). A person charged with this felony must be acquitted not only of the felony, but of the second offence, if the previous conviction is not proved (*R. v. Thomas*, 1874, L. R. 2 C. C. R. 141). Persons convicted after one previous conviction of offence (f) are guilty of misdemeanour; after two such convictions are guilty of felony (24 & 25 Vict. c. 99, s. 21). As to the proof of previous conviction, see PREVIOUS CONVICTION.

Defacing.—It is a misdemeanour to deface any current gold, silver, or bronze coin by stamping names or words thereon. The punishment is imprisonment for not over one year. The offence is committed even if the coin is not otherwise impaired (24 & 25 Vict. c. 99, s. 16).

Attempting to put a defaced coin into circulation is punishable on summary conviction on a prosecution with the consent of the Attorney-General (24 & 25 Vict. c. 99, s. 17).

Coining Tools, etc.—It is doubtful whether possession of coining tools was a common law offence (see 1 Russ. on Crimes, 6th ed., 198), but now it is a felony for any person, without lawful authority or excuse, knowingly to make or mend any appliances, machines, or tools adapted and intended (a) for counterfeiting British or foreign gold or silver coin (24 & 25 Vict. c. 99, s. 24); (b) for counterfeiting current copper coin (24 & 25 Vict. c. 99, s. 14). (c) The conveyance of tools or coin out of the mint, without lawful authority or excuse, is also a felony (24 & 25 Vict. c. 99, s. 25). These provisions apply to apparatus such as a galvanic battery (*R. v. Gover*, 1863, 9 Cox, C. C. 282).

The punishment for (a) and (c) is penal servitude for life or not less than three years, and for (b) penal servitude from three to seven years.

Procedure, etc.—Any person who finds counterfeit coin, or filings or clippings of coin, or coining appliances, is bound to seize them and take them before a justice of the peace; and if there is reason to suspect commission of an offence against the coin, a justice may issue a search warrant for execution

in the house of the suspected person. Coin, etc., seized with or without warrant is to be preserved under justice's order for evidence, and after that handed over to the mint authorities (24 & 25 Vict. c. 99, s. 27).

Persons found committing any indictable offence against the Coinage Act may be arrested by any person without warrant (24 & 25 Vict. c. 99, s. 31).

Where lawful authority or excuse is an answer to a charge under the Act, it must be proved by the accused. The purpose of the words is to protect officials dealing with counterfeit coin under proper instructions. As to the nature of the excuse to be proved, see *Dickins v. Gill* [1896], 2 Q. B. 310; *R. v. Harvey*, 1871, L. R. 1 C. C. R. 285. Counterfeiting a coin means so dealing with a piece of metal as to make it resemble, or likely to pass for, a genuine coin of a kind other than that which it was when it was dealt with (see *R. v. Hermann*, 1879, 4 Q. B. D. 284). As to counterfeiting foreign coin, see COIN, FOREIGN. The fact that a coin is counterfeit may be proved by any witness, not, as at one time, only by a mint official (24 & 25 Vict. c. 99, s. 29); and the offences of counterfeiting, etc., are complete even if the counterfeit coin is not perfect or fit for uttering (s. 30). The venue for coinage offences is regulated by secs. 28 and 36 of the Act of 1861, the latter section relating to offences in the Admiralty jurisdiction. The offences punishable by penal servitude for life are not, the rest are, triable at Quarter Sessions (*q.v.*) (5 & 6 Vict. c. 38, s. 1). Accessories and abettors may be tried and punished as in the case of all other indictable offences (24 & 25 Vict. c. 99, s. 35); and see ABETTOR; ACCESSORY. The costs of prosecution of offences relating to the coin are payable out of the local rate, in a private prosecution, on conviction only; in a prosecution by the Treasury solicitor, in all cases, apparently without any discretion of the Court to disallow them (24 & 25 Vict. c. 99, s. 42).

[For further authorities, see Greaves, *Crim. Law Consolidation Acts*; Archbold, *Cr. Pl.*, 21st ed., 855–882; Russ. on *Crimes*, 6th ed., 209–248; Stephen, *Dig. Cr. Pr.*, 5th ed., 354–361.]

Coin, Colonial.—1. The history of the currency in British colonies during the last three centuries “has exhibited the phenomena, singly or in combination, of barter, monometallism, gold, silver, and even copper, binetallism, and paper currency of all grades of imperfection.” Its details have been exhaustively treated by Mr. Chalmers in his *History of Colonial Currency*, 1893, which, though not an official publication, has been prepared with the fullest access to official means of information here and colonial. At present the coinage of some colonies is based on sterling standards, of others on non-sterling standards—gold, bimetallic, or silver, which are detailed in Chalmers, pp. 30, 31.

2. Under the Coinage Act, 1870, colonial coins may be made current in the United Kingdom, and the Orders in Council which regulate their currency, so far as in force, are collected—those before 1890 in *Statutory Rules and Orders*, Revised, vol. i. pp. 615, 618, and vol. viii. pp. 615–666; those since 1890 in the appendices to the official volumes of St. R. & O. for 1893, 1894, 1895, and 1896. Except Australian gold coin, no colonial coin is a legal tender in England. The supply of British silver and bronze coin from the Mint to the colonies is governed by regulations of 1881 (printed in Chalmers, p. 456), under which the cost of conveyance to the colony is defrayed by the Royal Mint, and the colonial authorities are required to collect and return worn coin for exchange at its token value.

3. The provision as to the amount of British coin which is a legal tender varies in different colonies; but as to the Australasian colonies (except Fiji and New Guinea) it is now the same as in England, by Order in Council of August 1896 (St. R. & O., 1896, p. 13).

4. *Offences*.—Two Acts as to coinage offences in the United Kingdom (2 & 3 Will. iv. c. 34, and 7 Will. iv. and 1 Vict. c. 90) were by the Coinage Offences (Colonies) Act, 1851, 16 & 17 Vict. c. 48, extended to all British colonies and possessions. The provisions of this Act, which make importation into colonies of coin counterfeiting British gold or silver coin from any royal Mint a felony punishable by transportation for life, may (s. 2) be modified by colonial legislation (s. 4), and do not apply to colonies in which legislation for the same purpose existed in 1851 (s. 3).

The provisions of the Coinage Offences Act, 1861, 24 & 25 Vict. c. 99, treat all colonial gold and silver coin coined in a royal Mint or lawfully current under proclamation or otherwise in the definition of "the Queen's current gold and silver coin," and colonial copper, bronze, or mixed metal coins in the definition of "the Queen's copper coin" (s. 1), so that the penalties of the Act apply to offences with respect to colonial as well as British coins.

See COIN, BRITISH.

Coin, Foreign.—1. Although there is power to make foreign coin current under the Coinage Act, 1870, it has not been exercised as to the United Kingdom, and no foreign coin is a legal tender in the United Kingdom.* Under the Customs Act, 1886, 49 & 50 Vict. c. 41, s. 2, authority is given by proclamation to stop importation of any coin made abroad specified in the proclamation. This power was exercised in May 1887 (St. R. & O., Revised, vol. i. p. 623), forbidding the importation of foreign-made coins of any material, except gold and silver. This was intended to get rid of the importation of French bronze coin, which had been found profitable. The circulation of Hanoverian medals and other tokens, which are too like current coin, was prohibited by 46 & 47 Vict. c. 25.

2. In certain colonies foreign coin is legal tender, and in some, *e.g.* British Honduras, the standard and almost the sole medium of currency. Its circulation is regulated in some colonies by local Acts or Ordinances; in others by Imperial Orders in Council or proclamations. All in force up to 1893 are referred to in Chalmers on *Colonial Currency*, and all the Imperial Orders, etc., are printed in the volumes of the Statutory Rules and Orders referred to under COIN, COLONIAL.

It is felony to counterfeit any foreign gold or silver coin or without lawful authority or excuse to bring or receive into the United Kingdom a counterfeit of any such coin with knowledge that it is false or counterfeit. The penalty in each case is penal servitude from three to seven years or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 99, ss. 18, 19; 54 & 55 Vict. c. 69, s. 1).

Uttering such foreign coin is a misdemeanour, punishable for a first conviction by not over six months' imprisonment; for a second by not over two years' imprisonment, in each case with or without hard labour (24 & 25 Vict. c. 99, ss. 20, 21).

If it is done after two previous convictions, it is a felony, punishable by penal servitude for life or not less than three years, or imprisonment as on a second conviction (24 & 25 Vict. c. 99, s. 21).

Counterfeiting foreign coin which is not gold or silver or of metals of equal value is a misdemeanour, punishable by penal servitude for three to seven years, or imprisonment as last stated (24 & 25 Vict. c. 99, s. 22). Any person who without lawful authority or excuse (which he must prove) is found with more than five pieces of counterfeited foreign coin, on summary conviction may be fined not more than 40s. (24 & 25 Vict. c. 99, s. 23), and forfeits the coin, which is to be destroyed. Half the penalty goes to the poor of the parish. Payment can be enforced by imprisonment in default (24 & 25 Vict. c. 99, s. 23; 42 & 43 Vict. c. 49, ss. 5, 47).

See COIN, BRITISH.

Collateral.—The word “collateral” is of frequent use in law, where it bears its ordinary signification of “parallel” or “additional.” It is used in a variety of connections; *e.g.* we speak of a collateral agreement, collateral security, collateral relations, and collateral facts.

A collateral agreement is one related, but ancillary, to the main contract come to between parties. It may be either written or verbal. In connection with agreements relating to a proposed dealing in land, questions have sometimes arisen whether agreements collateral to this main purpose are within the Statute of Frauds, and whether, therefore, they should be in writing; but it appears that such do not require to be in writing; it is otherwise, however, if the collateral terms are inseparable from the main contract (see Dart, *Vendors and Purchasers*, 6th ed., pp. 231 *et seq.*). In connection with other verbal agreements collateral to written documents, questions have frequently arisen, when it was sought to give them in evidence, as to their admissibility. The general rule with regard to this is that a verbal collateral agreement as to any matter on which the written agreement is silent, and which is not inconsistent with its terms, is admissible, if, from the circumstances of the case, it can be inferred that the document was not meant by the parties to form the complete agreement between them (see Stephen, *Digest of the Law of Evidence*, art. 90).

When used in the phrase “collateral security,” the word “collateral” bears its ordinary signification, viz. “parallel” or “additional,” unless, from the circumstances of the transaction, it appears to have been used by the parties as meaning “secondary” (see observations on the phrase in *In re Athill, Athill v. Athill*, 1880, 16 Ch. D. 211).

The phrase “collateral relations” is used in opposition to “lineal relations.” Collateral relations are those who are descended from the same stock or ancestor, but not, like lineal relations, descended the one from the other. For the different methods of computing the degrees of relationship between collaterals, see the title BLOOD RELATION.

Collateral facts in the law of evidence are those not bearing directly on the issue before the Court. As a general rule, they are inadmissible, but to this rule there are certain exceptions. For example, the character of a witness is collateral to the issue, but it is permissible to cross-examine the witness regarding it. Again, evidence of collateral facts may sometimes be given to contradict a witness, *e.g.* it may be shown that he has previously made a statement relating to the case at variance with his evidence at the trial (Stephen, *Digest*, arts. 131, 132). In criminal cases, collateral facts may be adduced in evidence by the prosecution to show guilty knowledge, or malice or intent, or system, on the part of the prisoner.

Collation to Benefice.—See ADVOWSON; PRESENTATION.

Collative Advowson.—See ADVOWSON.

Collecting Society—is a branch of a friendly society, whether registered or unregistered, which receives contributions or premiums by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the society (59 & 60 Vict. c. 26, s. 1). Such a society, if registered, is subject to the Friendly Societies Act, 1896, 59 & 60 Vict. c. 24, and also to the special obligations and regulations of the Collecting Societies, etc., Act, 1896, 59 & 60 Vict. c. 60; if unregistered, only to the latter Act, and so much of the former as is expressly incorporated. See FRIENDLY SOCIETY; INDUSTRIAL ASSURANCE COMPANY.

College.—The *collegia* of Roman law were societies of traders or craftsmen, the members of which enjoyed certain privileges and exemptions (see D. 47, 22, and C. 11, 17). In English law, the term college is properly applied to incorporated societies only; as to “colleges by reputation,” see 4 Rep. 106. The proprietors of a private school or institute sometimes assume the style of a college; they acquire, of course, no legal right or privilege by doing so. Of colleges properly so called, some (e.g. the College of Physicians or the Herald’s College) are professional societies; others (e.g. the College of St. Mary at Winchester or Clifton College) are public schools. Colleges in the Universities of Oxford and Cambridge are in their nature lay eleemosynary corporations. Some are of royal foundation; in others the king was *fundator incipiens*, the subject person who provided the endowment being described as *fundator perficiens*. A subject founder was usually permitted to reserve the right of visitation to himself and his heirs or successors in office; where there is no visitor specially appointed, the common law gives the right to the Crown; the right is exercised by the Lord Chancellor under the Great Seal. Lord Mansfield thought that a *mandamus* would lie to compel a college to hold an election in accordance with its statutes; but in *R. v. St. Catherine’s Hall* (1791, 4 T.R. 233; 2 R.R. 369) the Court declined to interfere, and referred the question to the Lord Chancellor. Some colleges obtained bulls of foundation from the Pope, but all powers of visitation exercised by the Bishop of Rome were transferred to the Crown by the 25 Hen. VIII. c. 21.

The governing body of each college consists of the head (who is styled master, provost, warden, etc.) and the fellows, or such of the fellows as are qualified by the statutes to vote. The scholars are on the foundation, though not members of the governing body; the students or graduates, not being fellows or scholars, whose names are on the books, are usually described as members of the college, but in law they are merely boarders (Cowp. 319). The tenure, duties, and emoluments of heads, fellows, and scholars are now regulated chiefly by the statutes framed by the Commissioners appointed under the Oxford University Act of 1854, the Cambridge University Act of 1856, and the Universities Act of 1877. In managing their property, colleges were formerly restricted by the provisions of the 13 Eliz. c. 10, and 14 Eliz. c. 11, but the Universities and College

Estate Acts of 1858 and 1880 have given large powers of leasing, etc. The authorities of a college are *in loco parentis* to the undergraduates, and questions of discipline are, generally speaking, left to the decision of the *forum domesticum*. For the position of a fellow, see the case of *Feistel v. King's College*, 1847, 10 Beav. 491, where it was held that a fellow was not forbidden by any rule of public policy to assign the income of his fellowship, though such an act might possibly subject him to deprivation under the college statutes. Lay college offices are within the Universities Tests Act, 1871, but in the *Hertford College* case, 1879, 3 Q. B. D. 693, it was held by the Court of Appeal that the Act applies only to colleges subsisting before it was passed, and does not prevent the creation of new colleges, the endowments of which are confined to the members of a particular religious body.

Collegiate Body.—An association, formed by royal licence, of several colleagues (Lat. *collegiati*) as a civil corporation or college for special purposes connected with literature, science, or art, and endowed with special privileges and revenues. The first European colleges were founded by the Dominicans and Franciscans, and were hostels for the use of the members or bursars, students of these orders, and it was on the lines of these institutions that the collegiate system of the two great English Universities of Oxford and Cambridge were formed. In England only the Crown can incorporate such bodies, or license others to assign temporal livings therein, and by the College Charter Act, 1871, 34 & 35 Vict. c. 63, all charters for the foundation of new colleges and universities, which may be referred to the Queen in Council, shall be laid before Parliament for a period of not less than thirty days before the report shall be submitted to Her Majesty. Among non-university collegiate bodies may be mentioned the Royal Society for the Advancement of Natural Knowledge, the Royal College of Physicians and the Royal College of Surgeons. The word "collegiate" has also been wrongly assumed by certain scholastic institutions aiming at a high grade or having high pretensions. As to the powers of the English Universities and other colleges to sell and lease land, see 21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59, and 43 & 44 Vict. c. 46. For regulations affecting the College of Physicians, see 32 Hen. VIII. c. 40; 23 & 24 Vict. c. 66, s. 3, and 49 & 50 Vict. c. 48; and for those affecting the College of Surgeons, see 18 Geo. II. c. 15; 38 & 39 Vict. c. 43, and 49 & 50 Vict. c. 48, ss. 3, 7).

Collegiate Church.—A religious house built and endowed for a society or body corporate, including a college or chapter consisting of a dean or president and canons or prebendaries. Although independent of any cathedral, such churches are nevertheless under the jurisdiction of the bishop of the diocese in which they are situated, and he exercises visitatorial powers over them. Those surviving at the present day are Westminster, Windsor, Wolverhampton, Heytesbury, Southwell, Middleham, besides Brecon (Wales) and Galway (Ireland). Of the two first mentioned the Crown is visitor. As to the government and arrangement of collegiate churches, see 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 27 & 28 Vict. c. 70, and 36 & 37 Vict. c. 39. Their services do not vary from those in the cathedrals. As to the resignation of incapacitated deans and canons, see 35 & 36 Vict. c. 8. See DEAN AND CHAPTER.

Collisions at Sea.

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Within the limits allowed to this article it is impossible to do more than indicate shortly the various legal aspects of the subject; and it is proposed to do so, omitting the details of practice, for which reference must be made to the recognised authorities (Marsden, *Collisions at Sea*, and Williams and Bruce, *Admiralty Practice*), under the following heads, namely—1. The maritime and common laws; 2. The legislation dealing with the subject; 3. The jurisdiction; 4. The law applicable; 5. The liability for collision; 6. The measure of damages; 7. The regulations; 8. Collision as an exception in policies and bills of lading.

1. *Collisions under the Maritime and Common Laws.*—Before this subject was dealt with by municipal statutes and international regulations, it was governed by the general maritime law, as administered in the Admiralty Court. Actions for collisions between ships were said to be *communis juris*, and were thus cognisable in that Court whatever might be the nationality of the ships, and enforceable by a process *in rem* on seizure of the ship, to the negligent navigation of which it was alleged that the collision was due. The question of negligence was determined by the rules of navigation generally recognised by the practice of sailors, *e.g.* sailing vessels on the port tack gave way to those on the starboard tack; and ships sailing free to both the former; ships under way had to avoid ships at anchor, and steamships to keep clear of sailing ships (*The Dumfries*, 1856, Swa. 63, and 10 Moo. P. C. 461, English and Danish ships; *The Zollverein*, 1856, Swa. 96, English and Prussian ships; *The Johan Friedrich*, 1839, 1 Rob. W. 35, both foreign ships; *The Saxonia and Eclipse*, 1862, Lush. 410, British and foreign ships). All the high seas were within the jurisdiction of the Admiralty (*The Johan Friedrich*, *ante*); full damages were recoverable from the ship in fault (*The Carl Johan*, 1821, Lord Stowell, cited in *The Dundee*, 1 Hag. Adm. 113; *The Girolamo*, 1834, 3 Hag. Adm. 169); and the owner of the ship was rendered liable by the process against the ship for damage done by her negligent navigation (*The Leon*, 1881, 6 P. D. 148). At common law there was a similar jurisdiction for all damage done by ships, whether on the high seas or within the body of an English county (where the Admiralty had no jurisdiction), but this was not enforceable *in rem*, and was only available where the owner of the negligent ship was resident within the jurisdiction. In it, as in the Admiralty jurisdiction, the question of liability was determined by the general rules of navigation (*Handyside v. Wilson*, 1828, 3 Car. & P. 528).

2. *Legislation.*—The subject was first dealt with by the Legislature in 1846 (9 & 10 Vict. c. 100), after the London Trinity House had six years before made a rule for the navigation of steamships, namely, that they shall pass on the starboard hand of each other, which, though not having the force of law, was enforced by the Admiralty Court (*The Friends*, 1842, 1 Rob. W. 484, 488; *The Duke of Sussex*, 1841, ditto, 275; *The Inmaganda Sara Clasina*, 1852, 8 Moo. P. C. 75). Under the Act of 1846 and succeeding Acts of 1851 (14 & 15 Vict. c. 79) and 1854 (17 & 18 Vict. c. 104), the Admiralty were given power to make regulations as to lights to be carried,

by vessels, and it was laid down that ships meeting each other should pass each other on the port side, and in narrow channels shall keep to their starboard hand (Admiralty orders as to lights were made in 1851 and 1858, given in Swabey, Appendix); and in 1862 regulations were embodied in the M. S. A. of that year (25 & 26 Vict. c. 63) with regard to the navigation of British ships in all waters, and foreign ships in British waters. These were succeeded by regulations made under Order in Council in 1863. Until such regulations received the approval of foreign countries, they had no effect beyond these limits; and consequently in collisions outside British jurisdiction in which a foreign ship was concerned, the question of liability was decided by the general maritime law (*The Dumfries*, ante; *The Zollverein*, ante; *The Saxonia*, ante). The regulations of 1863 and their successors have, however, been adopted by all maritime nations, and have thus formed from time to time a code of general maritime law for this purpose.

The present law governing the subject is contained in the Merchant Shipping Act, 1894, which only reproduces its predecessors' provisions on the subject. By this Act the Queen is empowered, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council to make regulations for the prevention of collisions at sea, and may regulate the lights to be carried and exhibited, the fog-signals to be carried and used, and the steering and sailing rules to be observed by ships; and those regulations (in this Act referred to as the Collision Regulations) shall have effect as if enacted in this Act. The collision regulations, together with the provisions of this part of the Act relating thereto, or otherwise relating to collisions, shall be observed by all foreign ships within British jurisdiction, and in any case arising in a British Court concerning matters arising within British jurisdiction, foreign ships shall, so far as respects the collision regulations and said provisions of this Act, be treated as if they were British ships (s. 418). Under this power regulations have been made from time to time, especially in 1863, 1880, and 1884, the last named of which are in force at the present moment. Ships, whether British or foreign, may be inspected by Board of Trade surveyors, to see that they are properly provided with lights and fog-signals; and if a notice from the surveyor to make good deficiencies in this respect be disregarded, the ship may be detained till the surveyor certifies that she is properly provided; or the owner may appeal to the Court of Survey for the district, and a report is made by that Court to the Board of Trade, who may grant the certificate, unless the surveyor is accompanied by a representative of the owner during the survey, when, if they agree, there is no appeal (s. 420). Local rules for lights and manœuvres in navigation in harbours, rivers, or other inland waters, are saved, if existing, or may be made by Order in Council if there is no other authority to do so (s. 421). Every case of collision and its circumstances are to be entered in the official log of the ship, and signed by the master, and either the mate or one of the crew, under penalty of a £20 fine (s. 423). Accidents causing loss of life or serious injury to persons, or material damage affecting her seaworthiness or efficiency in hull or machinery, sustained or caused by a steamship, must be reported to the Board of Trade (s. 425); and the Board must also be given notice of the loss of a British ship (s. 426). Her Majesty may, by Order in Council, make rules as to what signals shall be signals of distress, and the signals fixed by these rules shall be deemed to be signals of distress (s. 434). The collision regulations may be applied by Order in Council to the ships of any foreign Government which is willing that they, or the provisions of the Act relating thereto as to

collisions, shall do so when such ships are beyond British jurisdiction, and such ships thereby for the purpose of the said regulations and provisions may be treated as if they were British ships (s. 424). Under an identical provision in the former Acts, the present regulations (those of 1884) have been applied to the ships of France, Greece, Portugal, Italy, Sweden, Norway, Brazil, Turkey, Chili, and Denmark; and those of 1880 still apply to ships of Austria-Hungary, Belgium, Germany, Netherlands, Russia, Spain, United States, Ecuador, Hawaii, and Japan.

The sanction which enforces the observance of the regulations is as follows:—All owners and masters of ships are to observe the regulations; wilful infringement of them by owners or masters is a misdemeanour; if any damage to person or property arises from non-observance of them, it is to be deemed due to the wilful default of the person in charge of the deck at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary; when in a case of collision it is proved that any of the collision regulations has been infringed, the ship infringing the regulation is deemed to be in fault, unless the departure from it was made necessary by the circumstances of the case (s. 419).

The effect of this is to create a statutory presumption of fault on proof of the infringement of a regulation, which can only be met by showing that such infringement was necessary for the safety of the navigation (Lord Blackburn, *The Khedive*, 1880, 5 App. Cas. 876, 882; and, for instances, see *The Chilian*, 1881, 4 Asp. 473, and *The Benares*, 1883, 9 P. D. 16), or that such infringement could not by any possibility have contributed to the collision, the burden of showing this lying on the party guilty of the infringement, and proof that the infringement did not in fact contribute to the collision being excluded (*The Fanny M. Carrill*, 1875, 13 App. Cas. 455, note (P. C.), followed in *The Glamorganshire*, 1888, ditto, 454 (P. C.), and approved by the House of Lords in *The Duke of Buccleuch* [1891], App. Cas. 310). Previously to 1873 it was necessary in each case to ascertain whether the infringement of a regulation actually caused or contributed to the collision or not (*The Fenham*, 1870, L. R. 3 P. C. 212; *The Bougainville*, 1873, L. R. 5 ditto, 316); but this was altered by a provision of the Merchant Shipping Act of that year identical with the present law (36 & 37 Vict. c. 73, s. 17; *The Khedive*, ante).

In the following cases vessels have been held to blame for the infringement of a regulation which might possibly have contributed to the collision: a steamer under way without a masthead light, though the other ship saw her side light some time before collision (*The Lapwing*, 1882, 7 App. Cas. 512); a ship's light not burning when she was first sighted (*The Hibernia*, 1874, 2 Asp. 454); not sounding a mechanical fog-horn, though a mouth-horn, which was used instead, was actually heard by the other ship, and at the time that the vessel sailed from port the regulation requiring a mechanical horn was not in force (*The Love Bird*, 1881, 6 P. D. 80). While in the following cases such infringement has been held without possible effect on the collision: side lights showing over the wrong side, owing to their not being properly screened, but still not visible to the approaching vessel (*The Fanny M. Carrill*, ante); where a sailing trawler when trawling did not show side lights but only a masthead light, but it made no difference, as the other vessel would not have seen them as she had no lookout (*The Englishman*, 1877, 3 P. D. 18), or a sailing trawler carrying a masthead light as well as side lights, but such masthead light not being visible to the other vessel (*The Chusan*, 1885, 5 Asp. 476); a side light

partially obscured by a bellying foresail from showing right ahead when the other vessel was a point and a half on the other bow (*The Duke of Buccleuch, ante*); a brig being overtaken by another ship, and carrying an improper stern light, which could not have been visible to the other ship (*The Breadalbane*, 1881, 7 P. D. 186).

This statutory presumption, however, will not arise upon any infringement of a regulation which is applicable to the case: it only does so if those in charge of the vessel acting with reasonable and ordinary knowledge and skill know that the regulation becomes applicable (Lord Blackburn in *The Khedive, ante*; Lord Esher in *The Beryl*, 1884, 9 P. D. 137; Lord Herschell in *The Theodore H. Rand*, 1887, 12 App. Cas. 247, and *The Memnon*, 1889, 6 Asp. 488). "A man need not exercise his judgment instantaneously, a short but very short time must be allowed for this purpose" (Butt, J., *The Emmy Haase*, 1884, 9 P. D. 81). Though the regulations are intended for "preventing collisions," it seems that this presumption will apply, even where the collision is from the first inevitable (*The Buckhurst*, 1881, 6 P. D. 152; *The Khedive, ante*, Lord Blackburn, pp. 885 and 895), for the statutory rule was enacted to lessen the results of collision (Lord Watson, *ibid.*). The words "collision regulations" upon infringement of which this presumption of fault arises include, besides the general regulations, regulations made by Order in Council under sec. 421 and its predecessors, e.g. the Humber statutory rules (*The Ripon*, 1885, 10 P. D. 65), statutory rules in the Mersey (*The Lady Downshire*, 1878, 4 P. D. 26; *The Vera Cruz* (No. 1), 1884, 9 P. D. 88), or those under the Dockyard Ports Regulation Act, 1865 (28 & 29 Vict. c. 125, s. 7), or those under the Solent Navigation Act, 1881 (44 & 45 Vict. c. 219, s. 8); but not local rules made under a local Act, e.g. the Thames rules (*The Harton*, 1884, 9 P. D. 44; *The Monte Rosa* [1893], Prob. 23). But if the regulations apply to the locality of the collision as well as the local rules, the section comes into force on a breach of the general rules (*The Owl v. Ariadne*, 1881, 9 Sess. Ca. (4th) 118, collision in the Clyde). Where rules under a local Act prevail, no presumption of fault arises on the breach of any of them, but such fault must be shown to have contributed in fact to the collision (*The Monte Rosa, ante*).

An infringement of an applicable regulation may also be so trifling as not to oblige the Court to find the vessel in fault, e.g. a side light obscured by the cathead from $2\frac{1}{2}$ to 3 degrees, though otherwise in accordance with the regulations (*The Fire Queen*, 1887, 12 P. D. 147); "a literal compliance with the regulations is an impossibility, what we must look to is whether there is a reasonable compliance with them" (Butt J., *ibid.*).

The Merchant Shipping Act similarly attaches a presumption of fault to breach of another duty of all ships in collision. In case of collision it is the duty of the master, or person in charge, of each vessel, if it can with safety to itself do so, to render assistance to the other, and stand by her so long as it is necessary, and to give to the master of the other ship the name of his ship, and the port to which she belongs, and the ports from which she comes and whither she goes. If any master fail without reasonable cause to do so, in the absence of proof to the contrary, the collision is to be deemed to have been caused by his wrongful act, neglect, or default: he is guilty of a misdemeanour, and is liable to have his certificate cancelled or suspended (s. 422). Under the old Admiralty law in the event of failing to "stand by," the ship, though not held to blame, was condemned in the costs of the suit (*The Celt*, 1836, 3 Hag. Adm. 321). The present section reproduces sec. 36 of the M.S. A., 1872, and casts on the ship infringing it the burden of

proving that the collision was not due to her negligence. A ship has been so held to blame, although too much damaged to render assistance, for not answering signals of distress from the other ship (*The Emmy Haase, ante*; *The Adriatic*, 1875, 3 Asp. 16). When the collision is between a tug and tow and a third ship, the tug must stand by the ships in collision, but this statutory duty will not prevent her recovering salvage for so doing if the collision is not due to her negligence (*The Hannibal v. The Queen*, 1867, L. R. 2 Ad. & Ec. 56). The "person in charge" is the master and not the pilot, and if a ship while in charge of a compulsory pilot fails to stand by after a collision, her owners are none the less able to plead compulsory pilotage as a defence to the collision (*The Queen*, 1867, L. R. 2 Ad. & Ec. 354). The section has been applied to a case of collision with an open fishing boat (*Ex parte Ferguson*, 1871, L. R. 6 Q. B. 280).

These two statutory presumptions, it seems, apply to all ships whether British or foreign, and whether in British waters or not (*The Magnet*, 1875, L. R. 4 Ad. & Ec. 417; *The Englishman, ante*; *The Love Bird, ante*; *The Vera Cruz, ante*; Marsden, 63); except ships belonging to Her Majesty, which are exempt from the provisions of the M. S. A. (*H.M.S. Topaze*, 1864, 2 M. L. C. 38, and *H.M.S. Supply*, 1865, *ibid.* 262; M. S. A. s. 741), but are governed by Admiralty regulations which are in identical terms with the general ones, and thus a Queen's ship has been held liable under the presumption contained in sec. 419 (*The Lapping*, 1882, 7 App. Cas. 512). There are similar provisions in several of the British colonies (Marsden, 64). The other legislation on the subject will be found under the next head.

3. *Jurisdiction*.—Both the Admiralty Courts and Common Law Courts had jurisdiction over causes of collision, the former only on the high seas (which included all waters where the tide ebbs and flows and where great ships do go (13 Rich. II. 5 and 15 *ibid.* 3), and thus foreign waters), the latter everywhere; the former either by a process against the ship or against its owner personally, the latter only by personal process against the owner. The Admiralty Court was liable to be prohibited if it exercised jurisdiction over causes arising within a county (*Violet v. Blague*, 1618, Cro. (2), 514; *Martin v. Green*, 1664, 1 Keb. 730; *Velthusen v. Ormsley*, 1789, 3 T. R. 316); e.g. in the Thames (*The Eliza Jane*, 1836, 3 Hag. Adm. 335), or the Humber (*The Public Opinion*, 1832, 2 Hag. Adm. 398), or the Solent (*The Lord of the Isles, ibid.*), even though the ship were foreign, and there would have been no remedy at common law; but in this latter case the Admiralty Court did, when not prohibited, exercise jurisdiction (*The Good Intent v. The Prince Christian*, 1774, Mars. Adm. 130). The Admiralty jurisdiction was, however, extended by statutes of the present reign: the Admiralty Act of 1840 (3 & 4 Vict. c. 65, s. 6) providing that "the High Court of Admiralty shall have jurisdiction to decide all claims whatsoever in the nature of . . . damage received by any ship or sea-going vessel . . . whether such ship or vessel may have been within the body of a county or on the high seas at the time when . . . the damage was received in respect of which such claim is made"; and that of 1861 (24 Vict. c. 10, s. 7) providing that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Under these provisions it has been held that the Admiralty Court has jurisdiction over a collision between two British ships in foreign inland waters (*The Diana*, 1862, Lush. 539), or a collision between two foreign ships in foreign inland waters (*The Courier, ibid.* 541); though in an earlier case the Court declined to exercise jurisdiction in the case of two foreign ships in a Turkish river, 115 miles from the sea (*The Ida*, 1860, Lush. 6); and it has no jurisdiction over a collision between a British ship and a pier attached to foreign

soil, even though it belong to British subjects, for that is not a transitory action (*The M. Moxham*, 1876, 1 P. D. 107). It had jurisdiction over a collision happening in a dock connected with the river Thames, by channels provided with gates and locks (*R. v. Judge of City of London Court*, 1882, 8 Q. B. D. 609). A collision between a ship and a barge in the body of a county was triable in Admiralty (*The Malvina*, 1862, Lush. 493); but not one between two barges, both of which are propelled by oars, as neither is a "ship" within the statute (*Everard v. Kendall*, 1870, L. R. 5 C. P. 428); it has been since held that a hopper barge not propelled by oars, or otherwise than by being towed, is a "ship" within the definition given in the M. S. A., which is identical with that given in the Admiralty Act of 1861 (*The Mac*, 1882, 7 P. D. 126).

The lien for collision against the *res* causing it, though she is not herself in collision (*The Sisters*, 1876, 1 P. D. 117), is a maritime one, *i.e.* attaches to it even though it has changed hands since the collision (*The Bold Buccleugh*, 1852, 7 Moo. P. C. 267), whether the collision be on the high seas or in inland waters (*The Heinrich Bjorn*, 1886, 11 App. Cas. 282, Lord Bramwell); and see LIEN (MARITIME). Jurisdiction over collisions forms part of the County Courts Admiralty jurisdiction, limited to claims for a certain amount. See COUNTY COURTS. Both the Admiralty and common law jurisdictions are now vested in the High Court, and the Admiralty Division has thus co-extensive jurisdiction with any other; but the process *in rem* is only available in the Admiralty Division, and in causes over which the Admiralty Court had jurisdiction; and hence arises the importance of the inquiry whether, previously to the Judicature Acts, the High Court of Admiralty had jurisdiction.

Besides the Admiralty statutes, the Merchant Shipping Act gives an extended jurisdiction over claims for damage by collision. By sec. 688 (1) "whenever any injury has been caused to any property belonging to Her Majesty, or any of Her Majesty's subjects by any foreign ship, and at any time thereafter that ship is found in any port or river of the United Kingdom, or within three miles of the coasts thereof, a judge of any Court of Record in the United Kingdom . . . may, upon its being shown to him by any person applying summarily that the injury was probably caused by the misconduct or want of skill of the master or mariners of the ship, issue an order directed to any officer of customs or other officer named by the judge or Court . . . requiring him to detain the ship until such time as the owner, master, or consignee thereof has made satisfaction in respect of the injury, or has given security to be approved by the judge, etc., to abide the event of any action, suit, or other legal proceeding that may be instituted in respect of the injury, and to pay all costs and damages that may be awarded thereon; and every officer of customs or other officer to whom the order is directed shall detain the ship accordingly. (2) Where it appears that before an application can be made under this section the ship in respect of which the application is to be made will have departed from the limits of the United Kingdom, or three miles from the coast thereof, the ship may be detained for such time as will allow the application to be made, and the result thereof to be communicated to the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect of the detention, unless the same is proved to have been made without reasonable grounds. (3) In any legal proceeding in relation to any such injury aforesaid, the person giving security shall be made defendant . . . and shall be stated to be the owner of the ship that has occasioned the damage; and the production of the order of the judge, etc., made in relation

to the security, shall be conclusive evidence of the liability of the defendant to the proceedings." It was held under the identically worded section (s. 527) of the Merchant Shipping Act, 1854, that this gave a remedy *in rem* against the ship (*The Bilbao*, 1860, Lush. 149, damage by a foreign ship to a barge in the Thames, decided before the Admiralty Act of 1861).

An action *in personam* for collision may be brought in any Division of the High Court of Justice, and if the ship which has done the damage sinks in the collision, this is the only remedy available. If the owners of the sunken ship bring a cross cause or counter-claim in respect of the same collision, they can arrest the plaintiffs' ship without themselves giving the plaintiffs any security to meet judgment in the action *in personam*; but if the owners of the sunken ship first bring their action *in rem*, and the owners of the other bring a cross action *in personam*, the former will not be allowed to arrest the defendants' ship without giving the defendants security to meet judgment in the cross action (Admiralty Court Act, 1861, s. 35; *The Rougemont* [1893], Prob. 275). An action *in personam* for collision, whether on the high seas or within British or foreign waters, cannot be brought against a person not domiciled within the jurisdiction, unless the writ can be served on him within the jurisdiction, and the jurisdiction for this purpose ends at low-water mark of the coast, and no service of the writ out of the jurisdiction will be ordered in such a case (*In re Smith*, 1876, 1 P. D. 300; *The Vivar*, 1876, 2 P. D. 29; *Harris v. Owners of Franconia*, 1877, 2 C. P. D. 173).

In practice almost all cases of collision, owing to the advantage given by the process *in rem*, are tried in the Admiralty Division; and the following instances will serve to illustrate the various forms which an action for damages by collision may take. It may be a collision between two ships on the high seas (*Chartered Bank of India v. Netherlands India S. N. C.*, 1883, 10 Q. B. D. 521), or in British waters or foreign waters, whether both ships are British or both foreign, or one British and the other foreign (see cases *ante*); or between a ship and a ship aground (*The Elizabeth and Adalia*, 1870, 3 M. L. C. 345); or a ship sunk (*The Douglas*, 1881, 7 P. D. 107; *The Utopia* [1893], App. Cas. 542); or a ship at anchor (*The Batarvier*, 1845, 2 Rob. W. 407); or a dumb barge (*The Swallow*, 1877, 3 Asp. 371); or a keel, *i.e.* a craft having no masts and punted by a pole (*The Sarah*, 1862, Lush. 549); or an anchor (*The Rhosina*, 1885, 10 P. D. 24 and 131); or a lightship, buoy, or beacon, for which a penalty of £50 may be inflicted by M. S. A., 1894, s. 666 (*The Indus*, 1886, 12 P. D. 46); or a tug and tow (*The American v. The Syria*, 1874, L. R. 6 P. C. 132); or a fishing boat (*Ex parte Ferguson*, 1871, L. R. 6 Q. B. 280); or a dock (*The Zeta* [1893], App. Cas. 468); or a pier (*The Siquasi*, 1880, 5 P. D. 241); or a breakwater (*The Uhla*, 1867, L. R. 2 Ad. & Ec. 29 *n.*; *The Ereclisor*, 1868, *ibid.* 268); or a sea wall (*The Industrie*, 1871, L. R. 3 Ad. & Ec. 303); or the stump of a beacon (*Gilbert v. Corporation of Trinity House*, 1886, 17 Q. B. D. 795); or a dolphin (*The Albert Edward*, 1875, 44 L. J. Ad. 49); or a diver (*The Sylph*, 1867, L. R. 1 Ad. & Ec. 24); or a telegraph cable (*The Clara Killam*, 1870, L. R. 3 Ad. & Ec. 161); or an oyster bed (*The Octavia Stella*, 1887, 6 Asp. 182).

4. *The Law applicable to Collisions.*—The law to be applied in a case of collision generally depends on the place where it happens. A case of collision upon the high seas between any ships, whether foreign or British, is governed by the general maritime law as administered in England, and not by the law of the flags under which the ships are sailing (*The Dundee*, 1823, 1 Hag. Adm. 113, Lord Stowell; *The Johan Friedrich*, 1839, 1 Rob. W. 35,

and *The Milan*, 1861, Lush. 388, Dr. Lushington; *The Leon*, 1881, 6 P. D. 148, Sir R. Phillimore); and by that law the shipowner is liable for the negligence of the master and crew of his ship (*Chartered Bank of India case, ante*, Brett and Lindley L.J.J.); whether the Court has Admiralty jurisdiction or not (*Submarine Tel. Co. v. Dickson*, 1864, 15 C. B. N. S. 759, 779). Thus in a collision between an English and a Spanish ship, a defence that the damage was caused by the negligence of the Spanish ship's crew for which by Spanish law the master and crew, and not the owner, were liable, was held to be bad (*The Leon, ante*); in a collision between two ships sailing under the Dutch flag, the general maritime law, and not the Dutch, was applied (*Chartered Bank of India case, ante*); while in a case where a French ship collided with an English ship on the high seas, and the defendant in the action pleaded that the damage was not committed by him personally, and that he was a French subject and was not by French law responsible for the act of the master of the ship (whose negligence caused the collision), but that by that law a French company which was owner of the ship and the employer of the master was alone liable, this was held to be a good defence to the action (*General Steam N. Co. v. Guillou*, 1843, 11 Mee. & W. 877, 895).

On the other hand, where the collision takes place in territorial waters, the governing law is the territorial law; and if by that law the owner is not liable for the negligence of his master and crew, he is free from liability in a British Court. Thus where a ship collided with a pier on Spanish soil, and the parties agreed that all remedies against the ship and her owners shall be tried in England, and the English Court thus had jurisdiction "by contract as well as consent," it was held that the law of Spain must be applied, by which (it was said) the owners were not liable for the negligence of the master and crew (*The M. Mozham*, 1876, 1 P. D. 107; so *The Muchin*, Nov. 1884, Admiralty Court). The same point was raised in a recent case (*Imperial Japanese Government v. P. & O. S. N. C.* [1895], App. Cas. 644), whether a collision between a Japanese man-of-war and a mail steamer in the Inland Sea of Japan was governed by Japanese law, by which the Emperor is not liable for the negligence of his servants, or by general maritime law, but was not decided. In *The Saxonia*, 1862, Lush. 410, the Privy Council held that in the Solent, which is part of the county of Hampshire (see *The Lord of the Isles, ante*), an English statute did not govern navigation, but the general maritime law applied. Though the *lex loci* does govern for certain purposes, it is not allowed in a British Court to exclude the protections given by British law, e.g. the employment of a compulsory pilot (*The Halley*, 1868, L. R. 2 P. C. 193; and see *Pilot*).

Local regulations, whether British or foreign, bind foreign or British ships respectively in certain waters (*The Fyenoord*, 1858, Swa. 374; *The Seine, ibid.* 411, Marsden, 216).

5. *Liability for Collision*.—Primarily the actual person whose negligence causes the collision is liable for the damages caused by it; this is the case where the negligent vessel belongs to a sovereign, for no process *in rem* then is available against the ship, nor is the sovereign liable *in personam* (*The Athol*, 1 Rob. W. 374; *The Volcano*, 1844, 2 *ibid.* 337; *The Birkenhead*, 1848, 3 *ibid.* 75; *The Bellerophon*, 1875, 3 Asp. 58; *The Parlement Belge*, 1880, 5 P. D. 197); and only the officer actually in charge at the time of collision is so liable (*The Mentor*, 1799, 1 Rob. C. 337; *Nicholson v. Mounsey*, 1812, 15 East, 384; 13 R. R. 501). In practice, however, the Lords of the Admiralty appear to defend a suit for collision brought against the officer in charge of

a Queen's ship, and foreign Governments submit themselves to the jurisdiction of the Court (*The Prins Frederick*, 1820, 2 Dod. 451).

Generally the owner of the ship is liable, because he is the employer of the persons navigating her, and in absence of proof to the contrary those in charge of a ship are presumed to be employed by her owners (*Joyce v. Capel*, 1838, 8 Car. & P. 370). *Prima facie* the registered owner of the ship is the real owner (*Frazer v. Cuthbertson*, 1880, 6 Q. B. D. 93, 98, Bowen, L.J.), but this presumption may be rebutted by proof that the actual owner is somebody else or is not the employer of the persons in charge of the ship (*Hibbs v. Ross*, 1866, L. R. 1 Q. B. D. 534), for the shipowner is not liable *quâ* owner but *quâ* employer (Lord Cairns, *River Wear Commissioners v. Adamson*, 1877, 2 App. Cas. 751). The act of negligence must be within the scope of the servant's employment (*The Thetis*, 1869, 3 M. L. C. 357, where a captain was held to have implied authority from his owners to take another vessel in tow, and to render them liable for a collision in the course of the towage); and the owner will not be liable for a criminal act of his master (*The Druid*, 1842, 1 Rob. W. 391, a case of wilful collision; *The Ida*, *ante*, wilfully cutting another ship adrift; so *The James Seddon*, 1866, L. R. 1 Ad. & Ec. 64); but he is liable for the wilful negligence of the master or crew in infringing the regulations (*The Seine*, 1859, Swa. 411), even though that negligence is criminal (*The Franconia*, 1877, 2 P. D. 8 and 163, manslaughter). The charterer of a ship may be in the position of a *pro hac vice* owner and be liable for her navigation by his servants (see CHARTER-PARTY), when the real owner will be free from liability (*Hodgkinson v. Fernie*, 1857, 2 C. B. N. S. 415).

The owner of a ship may be liable by statute for damage done by her negligent navigation, whether the crew are his servants or not, *e.g.* by the Harbours, Docks, and Piers Act, 1847, s. 74, for damage to harbour works, to which that Act extends; and the ship may be detained by the harbour owner till sufficient security has been given for the amount of damage done by her; and it seems that a maritime lien thereupon arises against the ship (*The Merle*, 1874, 31 L. T. 447); but this will not make him liable for damage done by the ship, owing to *vis major*, such as tempest or act of God (*River Wear case*, *ante*). It has been a question whether the extent of the ship's liability in admiralty for damage by collision is greater than that of the owner at common law, *i.e.* whether in any case the ship is liable *in rem* where the owner would not be *in personam*. The balance of authority is in favour of making the two liabilities co-extensive. "Where damages are claimed for tortious collisions, a chattel, such as a ship . . . may be and frequently is spoken of as the wrong-doer; but it is obvious that although redress may be sometimes obtained by means of the seizure and sale of the ship . . . the chattel itself is only the instrument, by the improper use of which the injury is inflicted by the real wrong-doer" (Selwyn, L.J., *The Halley*, 1868, L. R. 2 P. C. 193, 201). "In a claim made in respect of a collision the property is not treated as the delinquent *per se*. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation, if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed not merely on the property but also on the owner through the property" (Brett, L.J., *The Parlement Belge*, *ante*, 218). "In all causes of action which may arise from circumstances occurring during the ownership of persons whose ship is proceeded against, no suit can ever be maintained against a ship where the

owners are not themselves personally liable or where their personal liability has not been given up, as in bottomry bonds, by taking a lien on the vessel; and in such cases the liability of the ship and of the owner are convertible terms" (Dr. Lushington, *The Druid*, ante). There have been, however, decisions where the ship has been held liable where the owners would not have been at common law; thus, where a yacht was put in the hands of an agent for sale, and owing to his negligence collided with another ship, she was held liable *in rem* (*The Ruby Queen*, 1861, Lush. 266), but in a somewhat similar case it was held no action *in rem* lay (*The Orient*, 1871, L. R. 3 P. C. 696); where a ship was chartered to the French Government, and while in tow of a steamer which the charterers ordered her to employ, and by her fault, collided with another ship, it was held that a maritime lien for damage attached, notwithstanding the contract between her owners and the charterers (*The Ticonderoga*, 1859, Swa. 215, Dr. Lushington, who added that the same rule would apply if the ship were absolutely demised to another person); and in a case of this latter description Sir R. Phillimore decided according to the opinion of Dr. Lushington (*The Lemington*, 1874, 2 Asp. 475), on the ground that "a vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the *res* while in possession of the charterers is therefore damage done by the owners or their servants, although those owners may be only temporary." In *The Tasmania* (1888, 13 P. D. 110), where a tug was chartered by the defendants to work for them with their own tugs, and one of the terms on which their tugs towed vessels was that they were not to be answerable for damage to their tows, whether due to the negligence of their servants or not, and the chartered tug collided with and sank her tow, Sir J. Hannen held that no action *in rem* would lie against the tug, her owners not being personally liable, and the charterers being exempted by the terms of the towing contract. Sir J. Hannen there said, on a review of the authorities: "The result of the authorities cited appears to me to be this that the maritime lien resulting from collision is not absolute. It is a *prima facie* liability of the ship which may be rebutted by showing that the injury was done by the act of some one navigating the ship, not deriving his authority from the owners; and that by the maritime law charterers in whom the control of the ship has been vested by the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers who are *pro hac vice* owners. These propositions do not lead to the conclusion that where, as between the charterers and the persons injured, the charterers are not liable, the ship remains liable nevertheless. On the contrary, I draw from these premises the conclusion that whatever is a good defence of the charterers against the claim of the injured person is a good defence of the ship, as it would have been if the same defence had arisen between the owners and the injured person." This statement of law seems to establish decisively the correlation of the ship's liability *in rem* to the responsibility of the person who has, for the time being, the control and ownership of the ship; and the remarks of Butt, J., in a later case, that "the remedy against the ship is not co-extensive with the remedy against her owners," are to be understood with reference only to the *quantum* of damages recoverable (*The Longford*, 1889, 14 P. D. 34). Where the ship is navigated by a compulsory pilot the owner has no liability, as the pilot is not his servant (see *PILOT*). A shipowner is not discharged from liability by his vessel sinking; though no

action *in rem* can then be brought (*The Normandy*, 1870, L. R. 3 Ad. & Ec. 152). For the liability of a pilot for collision, see PILOT.

The owners of cargo on board a ship negligently colliding with another are not liable for her negligence, though the cargo may be arrested for the freight due to the shipowner. The owner of that ship is liable to his cargo owner for the full value of the cargo (*The Bushire*, 1885, 5 Asp. 416); and the owner of the other ship is liable, if his ship is solely negligent, to the cargo owner for the full value, but if both ships are negligent, only for half the value (*The Milan*, 1863, Lush. 388; *Chartered Bank of India* case, 1883, 10 Q. B. D. 521).

Any persons may sue for collision who have suffered damage from it; they may be the owners of the injured ship, whether beneficial or registered (*The Ilos*, 1856, Swa. 100); passengers, master, or crew losing clothes or effects (*The Cumberland*, 1861, 5 L. T. 496); the owners or consignees of cargo in either the carrying or the other ship; the owners of the thing injured, whether dock, wall, etc. (see cases, *ante*); persons physically injured by the collision (*The Sylph*, 1867, L. R. 1 Ad. & Ec. 24; *The Beta*, 1869, L. R. 2 P. C. 447; *The Theta* [1894], Prob. 280) both *in rem* and *in personam*; persons entitled to sue under Lord Campbell's Act for damages for relatives killed by the collision *in personam*, but not by process *in rem* against the ship (*The Vera Cruz*, 1884, 10 App. Cas. 59; *The Bernina*, 1888, 13 App. Cas. 1); a posthumous child for the loss of its father (*The George and Richard*, 1871, L. R. 3 Ad. & Ec. 466); indorsees of bills of lading for the cargo though the cargo has been sold (*The Marathon*, 1879, 40 L. T. 163), or indorsers of bills of lading for the benefit of the persons proved to be entitled to the cargo (*The Glamorganshire*, 1888, 13 App. Cas. 454); bailees or other persons having a special property in, or temporary possession of, ship or cargo (*The Minna*, 1868, L. R. 2 Ad. & Ec. 97, where the plaintiffs had hired a barge on the terms that she was to be at their risk and returned to her owners in as good condition as when delivered); underwriters in the name of their assured, but only with the same rights as the assured (*Simpson v. Thompson*, 1877, 3 App. Cas. 279, where two ships belonging to the same owner collided owing to the negligence of the uninsured ship, and underwriters, who had paid for a total loss of the other, were not allowed to prove against the fund paid into Court by the owner as the limit of his liability). The master and crew cannot recover against their owner for a collision caused by the negligence of one of themselves, for the doctrine of common employment prevents it (*Liddy v. Gibson*, 1873, 11 Sess. Ca. (3rd) 304; *Hedley v. Pinkney* [1894], App. Cas. 222); but a compulsory pilot can in such a case (*Smith v. Steele*, 1875, L. R. 10 Q. B. 125). The owner or employer of the person actually to blame for the collision may recover damages from him (*Blewitt v. Hill*, 1810, 13 East, 13).

Whether or not it was a rule of the maritime law that the shipowner's liability was limited to the value of the ship and freight, it is now immaterial to consider; though by the municipal law of continental nations such a limit has been recognised for over two centuries, by the Roman and mediæval law it was expressly provided that the wrongdoer in a collision should make full compensation (Marsden, pp. 161 and 162). The history of the English legislation on the subject is given by Marsden (165); it need only be said here that by an Act of 1812 (53 Geo. III. c. 159), with a view to encouraging shipping, the limit of a shipowner's liability for damage to other ships and to cargo on board either of two ships in collision was fixed at the value of the ship sued and her

freight; and the M. S. A., 1854 (ss. 504, 505), fixed the same limit for damages recoverable for loss of life or personal injury, provided that in such cases the value of the ship was to be taken at not less than £15 per ton. This was repealed by the M. S. A., 1862, which is reproduced in the present law (M. S. A., 1894, s. 503), which provides that shipowners, whether British or foreign, where the following occurrences take place without their actual fault or privity, *i.e.* (a) where any loss of life or personal injury is caused to any person being carried in the ship; (b) where any damage or loss is caused to any goods, merchandise, etc., on board the ship; (c) where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (d) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship, shall be liable in damages (1) in respect of loss of life or personal injury, either alone or together, with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding £15 for each ton of their ship's tonnage; and (2) in respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding £8 for each ton of their ship's tonnage: (then follow provisions for ascertaining the ship's tonnage, etc.); subsec. (3) provides that the owner of every seagoing ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, and things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen. For what is a "distinct occasion," see *The Schwan v. The Albano* ([1892], Prob. 419). The words "improper navigation" have been held to apply not only to the negligent management of the vessel by her master and crew, but also the negligence of any person employed by the shipowner in connection with the construction, overlooking, and management of the ship (*The Warkworth*, 1883, 9 P. D. 20). A racing yacht colliding with another, when bound by the rules of the regatta, to pay "all damages" arising from her negligent navigation to the injured vessel, was not allowed to limit her liability (*The Satanita* [1897], App. Cas. 59). The statute only applies in cases of collisions between two ships, and not where a ship collides with a pier or the like. For the method of calculating ship's tonnage and the construction of this section, see LIMITATION OF LIABILITY.

The incidence of liability for collision is best illustrated by the statement by Lord Stowell in *The Woodrop Sims* (1815, 2 Dod. 83 and 85), which is exhaustive of the possible cases of collision, and the liabilities arising thereupon: "In the first place, the collision may happen without blame being imputable to either party, as where the loss is occasioned by a storm or other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame, where there has been want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the innocent party would be entitled to an entire compensation from the other." The effect of this is that where only one ship is

to blame, the ordinary rule of law is followed that she pays to the other the latter's full loss up to her own limit of liability; but where both ships are to blame, the ordinary rule of common law that there cannot be more than one liability in tort, *e.g.* that a ship can recover in spite of her wrongful navigation if the other could have avoided it, and cannot if the other could not have done so does not apply, but one of joint liability peculiar to the Admiralty Court, *viz.* that each ship pays the other half the latter's damages. The history of this rule, which was expressly preserved, and extended to "all proceedings for damages arising out of a collision between two ships" (*i.e.* to common law as well as Admiralty actions) by the Judicature Act, 1873, s. 25, subs. (9), is given by Marsden (pp. 145-157). It applies to all collisions between ships of any nationality and in whatever waters; and whatever be the degree of fault of the two ships, the loss is always divided between them both, as shown above (*Hay v. le Nore*, 1824, 2 Shaw (Sc.) App. Cas. 395; *The Khedive*, 1880, 5 App. Cas. 876; *The Beryl*, 1884, 9 P. D. 137); and the two faults need not, it seems, contribute to the collision, though they may to the damage (*The Margaret*, 1880, 6 P. D. 76). Whether the rule applies except where the two ships who are in fault collide, *e.g.* where one of them by her own fault and that of the other collides with a third, is doubtful, but, on principle, it seems that it does: while if one ship causes damage to another without colliding with her, *e.g.* by her navigation makes her run ashore, or damage a wall or pier, and there is also negligence in the latter ship, it seems that the rule will not apply.

When both ships are to blame, even if one limits her liability, it is now established that there is only one liability, one action, and one judgment,—that judgment being for the balance of half the loss on one ship over half the loss on the other, and one ship is not entitled to prove for half her loss against the other without deducting anything for her liability to the other (*The Khedive*, 1882, 7 App. Cas. 795). Marsden shows that this construction of the rule strongly favours the owners of cargo on board the colliding ships at the expense of the shipowners (pp. 137-141). A consequence of this construction is that it has been held that shipowners (or their underwriters standing in their shoes), to whom the balance is payable, cannot recover from other underwriters who have insured them under the ordinary running-down clause, against the consequences of having "to pay any sum in consequence of collision" between their ship and any other, for half the amount of the damage done to the other ship which was deducted from the half of their own damage is not a sum which they had become liable to pay in consequence of collision (*London S. S. Co. v. Gramplan S. S. Co.*, 1889, 24 Q. B. D. 32 and 663).

Where one ship in a collision, for which both are to blame, is in charge of a compulsory pilot, her owners can recover a clear half of her damage without any deduction for the damage of the other ship (*The Hector*, 1883, 8 P. D. 218), but no costs are given (*The Rigsborg Minde*, 1883, *ibid.* 132). See PILOT.

The rule applies between ships belonging to the same owner. And if both ships are to blame, the owner of cargo on board either ship can only recover half his damages from the other ship (*The Milan*, *ante*), unless he can sue on his contract. It also applies where one ship is actually guilty of negligence, and the other is only deemed to be for infringing the regulations (*The Khedive*, *ante*); or where both are so deemed to be; but does not where two ships are both to blame for damage to a third, for they are then joint tortfeasors, and judgment lies against each, for the

full amount (*The Aron and Jolliffe* [1891], Prob. 7; *The Englishman v. Australia* [1894], Prob. 239). It does not apply to actions under Lord Campbell's Act, for the Admiralty Court had no jurisdiction over such actions (*The Bernina*, 1888, 13 App. Cas. 1). There is no difference between the nature of negligence at common law and in admiralty, and apart from the statutory regulations, it has the same effect (*Cayzer v. Carron Co.*, 1884, 9 App. Cas. 873, Lord Blackburn, at pp. 880-883); in both it must actually contribute to the collision; and the mere fact of one ship being guilty of an act of negligence which the other ship can reasonably avoid will not make her to blame as well as the other, and deprive her of half her damages (*The Monte Rosa* [1893], Prob. 23). But this is only of importance when the question of negligence has to be determined by other than statutory regulations.

The presumption of liability for collision generally does not favour one ship more than another; each ship must always prove her own case in order to raise a presumption of fault against the other (Lord Wensleydale, *The London*, 1857, 11 Moo. P. C. 307, 312). The plaintiff must make out a *prima facie* case, even though the only defence be that the collision was an inevitable accident (*The Marpesia*, 1872, L. R. 4 P. C. 212; *The Benmore*, 1873, L. R. 4 Ad. & Ec. 132); this shifts the burden of proof to the defendant, who will then be liable, unless he can prove that he in no way contributed to the collision; and in the case of inevitable accident, he must show what the cause of the collision was, and that he was not responsible for it (*The Merchant Prince* [1892], Prob. 179).

Where one ship is under way and the other ship at anchor, the latter must first show that she was not negligent either as regards her lights or her place of anchorage: when she does so, the burden is then on the former ship to disprove her fault (*The Telegraph*, 1854, 1 Sp. Eccl. & Adm. 427; *The Annot Lyle*, 1886, 11 P. D. 114; *The Indus*, 1886, 12 *ibid.* 46; *The Culgoa*, 1893, 10 T. L. R. 564). But a ship under way and in broad daylight running down another at her moorings is in itself *prima facie* evidence of fault (*The City of Peking*, 1888, 14 App. Cas. 43, Lord Watson); and a ship which in the daytime, or on a clear night, collides with another at anchor or lying still in the water is *prima facie* in fault; and even though the latter be anchored in an improper place, another running into her may be also to blame (*The Batavier*, 1845, 2 Rob. W. 407). A ship which, at her launch, ran across the river into another at anchor was held not to blame, the latter having persisted, in spite of warnings, in remaining in an improper place (*The Cachapool*, 1881, 7 P. D. 217).

Where by the regulations one ship has to keep her course and the other to keep out of the way, there is no presumption of negligence against the latter in the event of a collision, for the one has a duty no less than the other. Where a sailing vessel is lost with all hands by collision with a steamer, the former must still make out a case; she may do this on the defendants' admissions in their pleadings and by only bringing evidence that her own lights were lit or seen burning a short time before collision (*The Aleppo*, 1865, 35 L. J. Ad. 9; so *The Lindisfarne*, 1896, 12 T. L. R. 267). Where a vessel has been missing for two years her owners may recover for her loss by identifying sidelights which in the shock of the collision between a steamer and a vessel unknown fell on the former's deck (*The Ouse*, 1892, Adm. Court). The burden of proving facts peculiarly in the knowledge of one party lies on him (*The Swanland*, 1855, 2 Sp. Eccl. & Adm. 109).

It has already been noticed that there is a criminal liability for wilful negligence causing a collision, wilful infringement of the regulations being a

misemeanour (s. 419 of M. S. A., 1894), and conviction of any offence exposing a master, mate, or engineer to loss of his certificate (s. 469); a pilot doing any act by wilful breach of duty or neglect of duty tending to the immediate loss, destruction, or damage of the ship, or omission to do any lawful act proper and requisite to be done by him for preserving the ship from loss, destruction, or serious damage, is guilty of a misdemeanour (s. 607). If death or injury is caused by the negligent navigation of a ship, the person navigating the ship is criminally liable in England, if that ship is British, or is foreign and within three miles from the British coast; and, perhaps, if a British ship is wilfully run down by a foreign ship in any waters, and life is thereby lost on board, that is murder committed on board the British vessel (*R. v. Keyn*, 1876, 2 Ex. D. 63; Territorial Waters Act, 1878, 41 & 42 Vict. c. 73). "Those who navigate the Thames (or, it seems, any waters) improperly, either by too much speed, or by negligent conduct, are as much liable if death ensues as those who cause it on the public highway either by furious driving or by negligent conduct" (Parke, B., *R. v. Taylor*, 1840, 9 Car. & P. 674). So where a foreign ship in charge of an English pilot in the Thames came into collision with another vessel, owing to the man at the helm failing to understand the pilot's orders, it was held that the pilot was guilty of manslaughter if he failed to make his orders understood (*R. v. Spencer*, 1846, 1 Cox, C. C. 352). Wilful infringement of local statutory regulations will, it seems, be criminal as much as in the case of the general regulations (*The Lady Downshire*, 1878, 4 P. D. 26, and other cases, *ante*). The Board of Trade may hold inquiries into any collision, and where a ship is lost, abandoned, or seriously damaged, or where life is lost, it may cancel the certificate of any officer by whose wrongful act or neglect it was caused (ss. 464 ff.).

A ship to blame for a collision cannot recover salvage from the other vessel for services rendered to her after it, though the latter is also to blame (*The Cargo ex Capella*, 1867, L. R. 1 Ad. & Ec. 356; *The Eltrick*, 1881, 6 P. D. 127); a tug cannot, if her tow does damage owing to her own negligence (*The Glengaber*, 1872, L. R. 3 Ad. & Ec. 534). A tug or salvor in collision with the vessel she is helping may recover salvage from her if she is not negligent herself: and so she can from one of two ships which she helps, though she negligently collides with the other (*The C. S. Butler*, 1874, L. R. 4 Ad. & Ec. 78). A ship may get salvage from a vessel which she "stands by" after a collision caused by the other's fault (*The Retriever*, 1867, 2 M. L. C. 555). And see SALVAGE. For other matters arising out of collisions, see TUG AND TOW: INEVITABLE ACCIDENT.

6. *Measure of Damages*.—The same measure of damages is allowed in case of collision whether the action is brought in Admiralty or at common law, i.e. the sufferer is entitled to a *restitutio in integrum*, i.e. to be restored to the same position as he was in before the damage was done (*The Clarence*, 1850, 3 Rob. W. 285; *The Clyde*, 1856, Swa. 23, the market value of the ship just prior to collision; *The Infatigable*, 1857, *ibid.* 200; *The Ironmaster*, 1859, *ibid.* 441, the value of the ship at collision,—all decisions of Dr. Lushington; *The Halley*, 1867, L. R. 2 Ad. & Ec. 7, Sir R. Phillimore). He is entitled to have the ship fully repaired, though this may make her more valuable than she was before collision (*The Pactolus*, 1856, Swa. 173; *The Munster*, 1896, 12 T. L. R. 264); a deduction of one-third new for old in the cost of repairs has been disallowed (*The Gazelle*, 1844, 2 Rob. W. 279); and the fact that some repairs would have had to be done anyhow in order to get the damaged ship reclassified makes no difference (*The Bernina*, 1886, 6 Asp. 65). The owner is entitled to recover the value of the ship, if totally lost, at the time of her loss (*The Clyde*, *ante*; *The Ironmaster*, *ante*),

and her freight (*The Canada*, 1861, Lush. 586; *The Northumbria*, 1869, L. R. 3 Ad. & Ec. 12, where Sir R. Phillimore states fully the principle of compensation for collision); and if the ship is not carrying freight, interest from the date of the collision upon her value (*The Gertrude*, 1888, 13 P. D. 105), though this is a rule peculiar to the Admiralty Division. Where the injured ship is lost after the collision, that loss is often presumed to be due to the collision (*The Mellona*, 1847, 3 Rob. W. 13, ship becoming unmanageable after collision and lost on a sandbank; *The Pensher*, 1857, Swa. 213, ship anchoring after collision and subsequently driving ashore; *The Linda*, 1857, *ibid.* 306; *The Dispatch*, 1861, 14 Moo. P. C. 83, ship which after second collision with same ship dragged her anchor and went ashore; *The George and Richard*, 1871, L. R. 3 Ad. & Ec. 466, loss of life owing to ship being driven ashore the day after collision; *The Maid of Kent*, 1881, 6 P. D. 178; *The City of Lincoln*, 1889, 15 P. D. 15, ship going ashore for want of compasses lost in collision). Those on board the injured ship must show ordinary skill and courage in saving her or minimising the effect of the collision (*The Hannah Park*, 1866, 2 M. L. C. 345, ship allowed to sink after collision; *The Thuringia*, 1872, 1 Asp. 283, ship improperly abandoned by her crew). They must take assistance if necessary (*The Flying Fish*, 1865, B. & L. 436, the question being "whether the damages could have been avoided by the exercise of ordinary nautical skill and resolution by the master"); must not abandon the ship unjustifiably (*The Linda*, above), but quitting her under a reasonable apprehension of danger is justifiable (*The Blenheim*, 1854, 1 Sp. Ecol. & Adm. 289); must repair the ship and recondition the cargo if possible (*The Eolides*, 1837, 3 Hag. Adm. 367, ship run ashore because of a leak; *The Elina*, 1880, 5 P. D. 237, a cargo heating owing to delay at a port), or beach the ship if necessary (*The Hansa*, 1886, 6 Asp. 268, cost of raising ship improperly abandoned is not recoverable). If the ship is sunk by the collision, the owner is not bound to raise her even though he can do so (*The Columbus*, 1849, 3 Rob. W. 158); if she is raised and is found to be not worth repairing, he can recover the expense of raising and docking her plus her value at the time of collision, and interest from that time less her value in the dock (*The Empress Eugénie*, 1860, Lush. 138); but he cannot recover the excess of her repaired value over her value at the time of collision, or for demurrage (*ibid.*). If acting as a prudent owner he sells her without repairing her, he can recover her value at the time of collision with interest from that time less her proceeds of sale (*The South Sea*, 1856, Swa. 141). The damages may be increased by the plaintiff's negligence after the collision, and, if so, such increase is not recoverable (*The Flying Fish*, ante; *The Scotia*, 1890, 6 Asp. 541); or by the weak state of the injured vessel at the time of collision, when full damages are nevertheless recoverable (*The Egyptian*, 1864, 2 M. L. C. 56, where a ship knocked about by bad weather was collided with by another, and there was held to be *prima facie* proof that all the damage was caused by the collision, which became absolute upon the owners of the other ship not rebutting it), unless it can be clearly discriminated what repairs were necessary before and what after collision (*The Princess*, 1884, 5 Asp. 451, where Sir J. Hannen (following Dr. Lushington in *The Alfred*, 1850, 3 Rob. W. 259) did not allow the repairs, which were necessary to make the ship seaworthy after collision, include repairs which would have been required to enable the ship to be reclassified; so *The Bernina* (No. 3), 1886, 6 Asp. 65).

The following items have been allowed as consequential damages: loss of expected salvage (*The Betsy Caines*, 1826, 2 Hag. Adm. 28, Lord Stowell); freight (*The Northumbria*, ante; *Heard v. Holman*, 1865, 19 C. B. N. S. 10,

Erle, C.J.; *The Norham Castle*, 1895, 12 T. L. R. 321, Bruce, J.); prospective increase of value of cargo (*The Thyatira*, 1883, 8 P. D. 155); expenses incurred for salvage or towage (*The Empress Eugénie*, ante; *The Inflexible*, 1857, Swa. 200; *The Linda*, *ibid.* 306; *The Diana*, 1874, 2 Asp. 366; *The Williamina*, 1878, 3 P. D. 99); the costs of defending a salvage action (*The Legatus*, 1856, Swa. 168), though this has been doubted (*The British Commerce*, 1884, 9 P. D. 28, where the commission on obtaining bail in a salvage action consequent on a collision was not allowed); cost of detaining officers and crew during repair of ship (*The Inflexible*, ante); difference between market value of ship before and after collision (*The Georgiana*, 1872, 21 W. R. 280, in Ireland); demurrage (*The City of Buenos Ayres*, 1871, 1 Asp. 169), but actual loss must be proved (*The Clarence*, 1850, 3 Rob. W. 285), and if the ship is a total loss it is not allowed (*The Columbus*, ante); loss of a charter-party or profits of a subsequent voyage (*The Star of India*, 1876, 1 P. D. 466; *The Consett*, 1880, 5 *ibid.* 229; *The Argentino*, 1889, 14 App. Cas. 523; *The Austin Friars*, 1894, 11 T. L. R. 633); probable earnings of a fishing voyage (*The Clarence*, ante; *The Eleanor*, 1878, 3 Asp. 582; *The Risoluto*, 1883, 8 P. D. 109), except in case of total loss, when only the value of the boat and her gear and interest is allowed (*The City of Rome*, 1887, Marsden, 121); and the master and part owner of a ship lost by collision cannot claim beyond the value of the ship at time of collision, e.g. his prospective earnings as master (*The Columbus*, ante); nor can any claim for loss of market for goods be made (*The Notting Hill*, 1884, 9 P. D. 105, following *The Parcino*, 1877, 2 *ibid.* 124); or for the loss of the use of a dredger belonging to a harbour authority (*The Greta Holme* [1896], Prob. 192, now, however, under appeal to the House of Lords); or for a general average contribution for jettison of cargo owing to the collision (*The Marpesia* [1891], Prob. 403).

Damages for loss of life are allowed, and may be assessed by a jury in the Admiralty Division (*The Orwell*, 1888, 13 P. D. 80). Damages are recoverable, in addition to the penalty, for injuring lightships or buoys (M. S. A. s. 666). An assured may recover full damages for collision though he has been paid by his underwriters, but he will hold them in trust for the benefit of the latter (*Yates v. Whyte*, 1838, 4 Bing. N. C. 272; *Sea I. C. v. Hudden*, 1884, 13 Q. B. D. 706). A cargo owner may recover full damages on his contract of carriage from the carrying ship, but can only get half his loss in tort from each ship if both ships are to blame (*Chartered Bank of India case*, 1883, 10 Q. B. D. 521; *The Bushire*, 1885, 5 Asp. 416).

7. *The Regulations*.—The statutory nature and sanction of the regulations has already been noticed; they apply nominally to collisions “at sea” and to all sea-going ships, large or small, even a fishing coble (*Ex parte Ferguson*, 1871, L. R. 6 Q. B. 280), but in practice they extend to tidal rivers and inland waters, unless there are any local rules prevailing there which are inconsistent with them (*The Concordia*, 1866, L. R. 1 Ad. & Ec. 93, Thames, before 1880 rules; *The Owl and Ariadne*, 1881, 9 Sess. Ca. (4th) 188, Clyde; *The Leverington*, 1886, 11 P. D. 117, entrance to Cardiff). They are to be construed literally (*The Libra*, 1881, 6 P. D. 142, Jessel, M. R.), and “as equivalent to an Act of Parliament, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of them, with regard to the trade or business with which they deal” (Brett, M. R., *The Dunelm*, 1884, 9 P. D. 164, 171). They are applicable when there is risk of collision. “The basis of the regulations for preventing collisions at sea is that they are instructions to those in charge of ships as to their conduct; and the

Legislature has not thought it enough to say, 'We will give you rules which shall prevent a collision'; they have gone further and said that 'for the safety of navigation we will give you rules which shall prevent risk of collision.' It is not enough if you do only that which will apparently prevent a collision; we will give you rules which shall regulate your conduct, not merely for the purpose of preventing a collision, but for the purpose of preventing even a risk of collision" (Brett, M. R., *The Beryl*, 1884, 9 P. D. at p. 138). "Another rule of interpretation is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of collision can be avoided—not that they are applicable when the risk of collision is already fixed and determined. . . . The right moment of time to be considered is that which exists at the moment before the risk of collision is constituted" (*ibid.* p. 140). At the same time, "rules which are to regulate the conduct of people can only apply to circumstances which must or ought to be known to the parties at the time. . . . The consideration must always be in these cases not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable" (*ibid.* pp. 138, 139). A sufficient time must be allowed to those in charge of one ship to decide whether the course of the other ship is dangerous or not (*The Emmy Haase*, 1884, 9 P. D. 81, Butt, J.); and if one ship by wrong manœuvres places another in a position of extreme danger that other will not be held to blame if she is not manœuvred with perfect skill and presence of mind (*The Bywell Castle*, 1879, 4 P. D. 219, Lord Esher; *The Tasmania*, 1890, 15 App. Cas. 223, Lord Herschell).

The regulations at present in force were adopted at an international conference held at Washington in 1889–1890 for this purpose. It is only possible in the present limits to summarise their different articles, and illustrate them by reference to the decisions under the articles previously in force; and for the sake of convenience they are set out with those parts of them which are additions to the old ones of 1884 (referred to below as "old") marked in italics. They apply to all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels. "Steam vessel" means any ship driven by machinery. A vessel "under way" is one not at anchor, or made fast, ashore, or aground. "Visible," applied to lights, means visible on a dark night with a clear atmosphere.

The first part of the articles deals with lights. The prescribed lights and *no others* are to be carried in all weathers, from sunset to sunrise (art. 1). Steamships under way must carry a white light on the foremast or forwards not less than 20 feet above the deck or the width of the deck if greater, to show 10 points on each side of the vessel, and visible for five miles, as well as two side lights, viz., a green light on the starboard bow, and a red on the port bow, showing over an arc of 10 points, *i.e.* from right ahead to 2 points abaft the beam, visible for two miles, and screened so as not to show across the bow. *A steamer under way may also carry an additional light, similar to the masthead light* (art. 2, old 3). The Admiralty Court has power to order inspection of a ship's lights which has been in collision (*The Magnet*, 1875, L. R. 4 Ad. & Ec. 417; *The Ouse*, 1892, Adm. Ct.; Admiralty Act, 1861, s. 35). A steamer towing another must carry besides her side lights two white lights vertically over each other, and *while towing more than one vessel an additional white light if the length of tug and tow exceeds 600 feet, and may carry an additional white light abaft her funnel to steer by* (art. 3, old 4). Vessels not under command must carry two (formerly three) red lights vertically over each other in the same position

as the masthead light by night, and by day *two* (formerly three) black balls over each other. A ship able to make way at four to five knots an hour, to steer and to stop and reverse, though less quickly than before, owing to an accident to her machinery, but the danger of the machinery ceasing to work at any moment not being imminent, is not out of command (Lord Herschell, *The P. Caland* [1893], App. Cas. 207): while a steamer, which in a gale unshackles her anchors, banks her fires, shuts off steam, and rides head to wind by her chains, is out of command (*The Puckrelandet* [1895], Prob. 205). A vessel, whether steam or sailing, engaged in telegraph cable service must carry in the same position as the masthead light (and in place of it if the former) three lights vertically over each other, the lowest and highest of which are red and the middle white, to be visible all round the horizon by night, and by day three shapes in position and colour corresponding to those lights. Both ships out of command and telegraph service ships must carry their side lights if making way through the water, but not otherwise (art. 4, old 5). Telegraph service ships are bound by the collision regulations under the Submarine Telegraph Cables Convention, 1885. A sailing ship under way and *any ship being towed* must carry the lights specified in art. 2 for steamers, except the white masthead light (art. 5, old 6). A sailing ship hove to is "under way" (*The Rosalie*, 1881, 5 P. D. 243), and so is a ship with her anchor down, but not held by it (*The Esk and Gitana*, 1869, L. R. 2 Ad. & Ec. 350). Small vessels in bad weather, which cannot carry fixed side lights must have them ready to show to an approaching vessel (art. 6, old 7). *Steamers of less than 40 tons and vessels under oars or sails of less than 20 tons when under way need not carry the lights specified in art. 2, but if they do not, must carry (α) in the case of steamers a white masthead light, and either green and red side lights of less power than those in art. 2, or a combined green and red lantern under the white light; (β) in the case of vessels under oars or sails a combined green or red lantern ready to show to approaching vessels, while rowing boats must exhibit a white lantern light in time to prevent collision. None of these vessels need carry the lights specified in art. 4 (a) or art. 11, last paragraph (art. 7). Pilot vessels need only carry a white light at the masthead, and show flares at intervals while engaged on their station; on other vessels approaching they must show their side lights as if they were fixed lights; if obliged to go alongside a vessel to put a pilot on board they may show the white light instead of carrying it, and have a coloured lantern ready instead of the side lights: when not so engaged they carry the lights proper for vessels of their tonnage (art. 8, old 9). A pilot boat being towed must not carry her masthead light (*The Mary Hounsell*, 1879, 4 P. D. 204). Article 9 of the new regulations is not yet issued, and the old article 10 stands for the present; it contains provisions for fishing vessels, the effect of which is that those under 20 tons under way need only have a combined colour lantern ready to show to approaching vessels; while fishing craft of 20 tons and upwards, while in the sea off the coast of Europe, north of Cape Finisterre, if fishing, must carry two white lights, and if under way or at anchor the ordinary lights of other vessels; and British fishing craft of 20 tons and upwards, if fishing in those waters, and not stationary, must carry either the ordinary lights for steam or sailing vessels respectively, or combined coloured lanterns to give the same effect, or a single white light with red flares to approaching ships; while if their trawls are not in the water they carry the ordinary lights (see *The Dunelm*, 1884, 9 P. D. 164; *The Chusan*, 1885, 5 Asp. 476; *The Tweedsdale*, 1889, 14 P. D. 164; *The Orion*, 1891, 7 Asp. 88, trawler only bound to show red flares when approaching vessel causes danger of collision; and see FISHING). A*

vessel overtaken by another must show from her stern a white light or flare up; *this may be a fixed lantern showing over 12 points of the compass on the same level as the side lights* (art. 10, old 11). Such a light must be shown from time to time till the overtaking ship is past (*The Essequibo*, 1888, 13 P. D. 53; *The Bassett Hound*, 1894, 11 T. L. R. 609). A ship is "overtaken" if the other is approaching her in such a position as not to see her side lights (*The Main*, 1886, 11 P. D. 132). A vessel under 150 feet in length at anchor must carry a white anchor light; *if more than that length she must carry two such lights, one forward and one astern, and one higher than the other*. A vessel aground in a fairway must show this and the two red lights of art. 4 (art. 11, old 8). *Every vessel may also show flares or use detonating signals in order to attract attention* (art. 12, adopting *The Merchant Prince* (1885, 10 P. D. 139)). Special rules made by Governments with respect to additional station and signal lights for two or more ships of war or convoy ships are saved, as are recognition signals adopted by shipowners and authorised by their Governments (art. 13, old 26). As to Queen's ships, see p. 89. *In day time a steamer proceeding under sail only, but having her funnel up, must carry a black ball forward* (art. 14).

The second part of the articles deals with fog signals to be given by steamers on their sirens, and sailing vessels and tows on their fog-horns; in fog, mist, or falling snow, or heavy rain storms, a steamer having way on her must sound every two minutes a prolonged blast; *if under way but stopped, and having no way on her, two prolonged blasts every two minutes*. Sailing vessels under way must sound every minute one blast if on the starboard tack, two if on the port tack, and three if the wind is abaft her beam; a vessel at anchor is to ring her bell *five seconds* every minute; a vessel engaged in telegraph service or under way, and not under command, must sound every two minutes a prolonged blast, followed by two short ones; *sailing vessels and boats under 20 tons instead of these signals may give other efficient ones every minute* (art. 15, old 12). Under the like conditions of weather, vessels are to go at a moderate speed; *a steamer hearing apparently forward of her beam the fog signal of a vessel whose position is not ascertained, must stop so far as the circumstances admit, and navigate cautiously till the danger is over* (art. 16, old 13). What is a "moderate speed" depends on the circumstances of each case. (*The Beta*, 1884, 9 P. D. 134, where in a dense fog in the British Channel it was held that a vessel must not go faster than will enable her to be kept under command.) Seven knots an hour for an ocean steamer in the track of ships in a fog, 200 miles east of Sandy Hook, has been held too fast (*The Pennsylvania*, 1870, 3 M. L. C. 477); so has 4 knots an hour in the Baltic, 28 miles east of Gothland, in fog so thick that a ship could not be seen 70 yards off (*The Magna Charta*, 1871, 1 Asp. 153); and $3\frac{1}{2}$ to 4 knots an hour in a dense fog in the sea 10 miles off Ushant (*The Dordogne*, 1884, 10 P. D. 6); and 5 knots for a barque in the English Channel (*The Zadok*, 1883, 9 P. D. 114); and 6 or 7 knots in a bank of fog in a thick fog in the Clyde (*The Owl and Ariadne, ante*), and going at 8 or 9 knots into fog without whistling or reducing is too fast (*The N. Strong* [1892], Prob. 105); while $3\frac{1}{2}$ knots an hour off Cromer in a fog has been held to be moderate (*The Ebor*, 1886, 11 P. D. 25). By moderate speed in a river or narrow channel it is meant that a ship must be brought nearly to a standstill; in the open sea, but in the track of ships in fog, a ship must proceed very slowly, but not so slowly as in a narrow river (Lord Esher, M. R., *ibid.*; and see *The Lord Bangor* [1896], Prob. 28, tug and tow's "moderate" speed). The addition to the article only expresses

what has been laid down in the cases, viz. that in a fog when one vessel hears the whistle of another approaching, unless there are unequivocal signs that the other will go clear of her, she is bound to stop at once (*The Frankland*, 1872, L. R. 4 P. C. 529; *The Kirby Hall*, 1881, 8 P. D. 71; *The Ceto*, 1889, 14 App. Cas. 670; *The Lancashire* [1894], App. Cas. 1), though a mere alteration of course is not of itself negligence under such circumstances (*The Findomora* [1891], App. Cas. 1).

The third part of the articles deal with the rules of navigation. Art. 17 (old 14) provides that where two sailing vessels are approaching each other so as to involve risk of collision, (a) a ship which is running free must keep out of the way of one close hauled; (b) a ship close hauled on the port tack gives way to one close hauled on the starboard tack; (c) where both are running free with wind on different sides, the vessel on the port tack gives way to the other on the starboard tack; (d) where both are running free with the wind on the same side, the windward vessel keeps out of the way of the leeward. A ship hove to is close hauled (*The Eleanor*, 1865, 2 M. L. C. 240; *The Rosalie*, 1881, 5 P. D. 245; *The Lake St. Clair v. Underwriter*, 1877, 2 App. Cas. 389).

Art. 18 (old 15) provides that where two steamships are meeting end on, or nearly end on, so as to involve risk of collision, each must go to starboard (i.e. enough to take one ship clear of the other if the other does not starboard—*The Jesmond*, 1871, L. R. 4 P. C. 1), but the article only applies where by day each vessel sees the masts of the other in line, or nearly so, with her own, and by night each vessel can see both side lights of the other; and not where the ships will pass each other if they keep their respective courses, or where they are red to red or green to green, or both side lights are visible anywhere but ahead, e.g. ships in winding channels which will go clear of each other (*The Velocity*, 1869, L. R. 3 P. C. 44; *The Ranger*, 1872, L. R. 4 P. C. 519; *The Oceano*, 1878, 3 P. D. 60); or ships rounding a headland (*The Byrell Castle*, 1879, 4 P. D. 219).

Art. 19 (old 16) provides that where two steamers are crossing so as to involve risk of collision, the one which has the other on her starboard hand has to keep out of the way. (For the difference between crossing and overtaking ships, see arts. 24 and 10; and *The Franconia*, 1876, 2 P. D. 8; *The Peckforton Castle*, 1878, P. D. 11.) By art. 20 (old 17), where a steamer and sailing vessel are approaching each other, the steamer must keep out of the way. By art. 21 (old 22), where one ship has to keep out of the way by these rules, the other must keep her course, but in thick weather or other special circumstances, the latter must also act so as to avert collision (*The Zadok*, 1883, 9 P. D. 114). By art. 22, every vessel bound to keep out of the way of another must, if possible, avoid crossing ahead of her. By art. 23 (old 18), every steamer directed to give way to another on approaching her must, if necessary, slacken her speed, or stop to reverse. For a steamship's duty in fog, see art. 16 and cases there cited: *The Beryl* (1884, 9 P. D. 137); *The Ceto* (1889, 14 App. Cas. 670): for it in clear weather, see *The Khedive* (1880, 5 App. Cas. 876); *The Mcmon* (1889, 6 App. Cas. 488); *The Arratoon Apar* (1889, 15 App. Cas. 38, where not slackening speed till the green light of the other ship appears for the third time to a ship meaning to pass port to port was held too late); *Wilson v. Currie* ([1894], App. Cas. 116, where the ships could have passed port to port, and one ship was held justified in waiting to stop and reverse till she had repeated her port helm signal); and see *The Albis* (1895, 8 App. Cas. 92). It may be overridden by art. 27 (*The Benares*, 1883, 9 P. D. 16). By art. 24 (old 20), every overtaking vessel is to keep out of the way of the overtaken vessel; an

overtaking vessel is one which is coming up with another from any direction more than 2 points abaft her beam, or such a heading that by night she could not be able to see either side light of that vessel, and no subsequent alteration of bearing will make her a crossing ship, or relieve her from the duty of keeping clear; and by day the overtaking vessel should always assume, if in doubt, that she is overtaking and not crossing (see *The Franconia*, ante; *The Seaton*, 1883, 9 P. D. 1; *The Main*, 1886, 11 P. D. 132; *The Molière* [1893], Prob. 217). "Where the overtaken ship deviates from her course, the duty of the overtaking ship is only to exercise reasonable care to keep out of her way, and she is free from the absolute obligation of the article" (Lord Esher, *The Saragossa*, 1892, 7 Asp. 289; and see *The Sandhill* [1894], App. Cas. 646). This article thus overrides the "crossing" and "meeting" ones—arts. 19 and 18. By art. 25 (old 21), in narrow channels steamers must, if possible, keep to the starboard side of the fairway. A "narrow channel" applies to the Straits of Messina (*The Rhondda*, 1883, 8 App. Cas. 549); entrance to Falmouth harbour (*The Clydach*, 1884, 5 Asp. 336); Cardiff drain (*The Leccerington*, 1886, 11 P. D. 117); Swin channel between Middle Lightship and Middle Sands in the Thames (*The Minnie* [1894], Prob. 336). In winding rivers steamers going up against the tide should wait for vessels descending round points, either by custom of navigation or positive rule (*The Talabot*, 1890, 15 P. D. 194, Scheldt; *The Diana and Cliveden* [1894], App. Cas. 625, Danube; *The Libra*, 1881, 6 P. D. 142, Thames).

By art. 26, *sailing vessels under way must keep out of the way of fishing sailing craft, but the latter must not obstruct the fairway*. By art. 27 (old 23), in obeying the rules due regard is to be had to all dangers of navigation and collision, and any special circumstances making a departure from them necessary to avoid immediate danger (*The Benares*, 1883, 9 P. D. 16; *The Ada*, 1872, 1 Asp. 475; *The Buckhurst*, 1881, 6 P. D. 152, unmanageable ship; *The Highgate*, 1890, 63 L. T. 841, sailing vessel departing from her course; *The Tasmania*, 1890, 15 App. Cas. 223).

Art. 28 (old 19) deals with sound signals for vessels in sight of each other; one short blast from a steamer means she is porting; two, that she is starboarding; three, that she is going full speed astern. Art. 29 (old 24) provides that no vessel is under any circumstances to neglect to use proper lights or signals, or any precaution required by ordinary practice of seamen or special circumstances of the case. Instances of such neglect are: bad lookout (*The Germania*, 1869, 3 M. L. C. 269); lookout obscured by smoke from the funnel (*The Rona*, 1873, 2 Asp. 182); no anchor watch (*The Pladda*, 1876, 2 P. D. 34); insufficient lookout and crew (*Clyde N. C. v. Barclay*, 1876, 1 App. Cas. 790; *The Scotia*, 1890, 6 Asp. 541); giving a foul berth (*The Annot Lyle*, 1886, 11 P. D. 114); ship being allowed to drag (*The Princeton*, 1878, 3 P. D. 4); bad ground tackle (*The Massachusetts*, 1842, 1 Rob. W. 371); not keeping clear of ship at anchor (*The Batarier*, 1845, 2 Rob. W. 407); missing stays (*The Kingston by Sea*, 1850, 3 Rob. W. 152); bringing up in a fairway (*The Aquadillana*, 1889, 6 Asp. 390); getting under way unnecessarily in bad weather (*The Borussia*, 1856, Swa. 34). Art. 30 (old 25) saves special rules of navigation made by a local authority for harbour, river, or inland waters, e.g. the Thames, Mersey, Humber, Tees, Tyne, Suez Canal, Danube. Art. 31 (old 27) prescribes the distress signals to be used if necessary.

8. *Collisions in Bills of Lading and Policies*.—In both alike the peril of collision is covered by the words "perils, accidents, and dangers of the seas and navigation" (*Buller v. Fisher*, 1799, 2 Esp. 67); but in bills of lading,

where the negligence causing the collision is that of the ship carrying the cargo, these words do not cover it (*Lloyd v. General Steam I. N. C. Co.*, 1864, 3 H. & C. 284; *Grill v. The Same*, 1866, L. R. 1 C. P. 600, and 3 C. P. 476); though they do, if the negligence is that of the other ship (*Garston Co. v. Hickie*, 1886, 18 Q. B. D. 17; *The Xantho*, 1887, 12 App. Cas. 503). The word "collision" in a bill of lading is construed in a similar way (Lindley, L.J., *Chartered Bank of India* case, 1883, 10 Q. B. D. 521); and under a bill of lading, excepting liability for "collision, accidents, loss, or damage from any act, neglect, or default of pilots, master, or mariners, or other servants of the company, in navigating the ship," upon a collision taking place between two ships belonging to the same owner, it was held that the cargo owner could only recover half his damages from the non-carrying ship, the exception protecting the carrying ship (*ibid.*). In policies the question of negligence is immaterial, as it is not the proximate cause of loss to the insured; but though collision is "a peril of the sea," these words will not make the underwriters liable for a payment of balance of loss for the insured ship (which is negligent) to the other (which is also negligent) under the Admiralty rule of dividing the loss in such case, or for the costs and expenses incident to the collision, all these having to be provided for by a special clause (the running-down clause) (*De Fauce v. Salvador*, 1876, 4 Ad. & E. 420). For instances of "collision" expressly insured against, see *Pink v. Fleming* (1890, 25 Q. B. D. 396); *The Monroe* ([1893], Prob. 248); *The North Britain* ([1894], Prob. 77). A tow insured against "collision" is protected against one between her tug and another ship, for which both she and the tug were liable in damages (*The Niobe* [1891], App. Cas. 401). See MARINE INSURANCE.

[*Authorities*.—See Marsden, *Collisions at Sea*; Williams and Bruce, *Admiralty*; Pritchard's Digest, *Collision*; Abbott, *Shipping*; MacLachlan, *Shipping*.]

Collisions on Land.—See BOARD OF TRADE, *ante*, vol. ii. p. 194, and RAILWAYS.

Collusion.—See DIVORCE; FRAUD.

Colonial Churches.—See CHURCH OF ENGLAND.

Colonial Courts, Governors, Legislatures, Office.—See COLONY.

Colonial Forces.—The military colonial forces are of two classes: (1) the forces raised in a colony (*q.v.*) by the Colonial Government itself, and known as the local forces, including militia, volunteers, and armed constabulary; (2) the forces raised by direct orders of the Crown, and forming part of the regular forces, whose pay and maintenance are annually provided by the Imperial Parliament. All of the latter class have since 1870 been withdrawn from the self-governing colonies, and those in the colonies directly governed by the Crown are either detachments of the British army, sent as garrisons, or local companies, such as the West Indian Regiments, the Royal Malta Artillery, etc.

When Imperial troops are in a colony, the officer in command, and not the governor, unless specially invested therewith, has the military charge, although the governor bears the title of captain-general or commander-in-chief (*q.v.*); and if the colony is invaded, or assailed by a foreign enemy, the officer in command assumes the entire military authority over all classes of the troops.

By virtue of his commission from the Crown, the governor is usually the commander-in-chief of all local forces raised within the colony. In the Acts of the various colonies raising these forces provision is made for their government and discipline; and the Canadian militia are also by local Act made subject to the Queen's regulations and orders for the army, and to all other Imperial laws applicable to Her Majesty's troops in Canada which are not inconsistent with the statute (Canada Militia and Defence Act, 1868, 31 Vict. c. 40, s. 61). This Act was amended in 1875, and the militia placed under the command of an officer of the rank of a colonel, or of superior rank, in the army, whose duties are analogous to those performed by the commander-in-chief of the army. Similar arrangements are in force in other colonies.

These local forces are only subject to the Army Act when serving with part of Her Majesty's regular forces, and then only so far as the colonial law has not provided for their government and discipline, and subject to the exceptions specified in the general orders of the general officer commanding Her Majesty's forces with which such force is serving (sec. 177 Army Act, 1881, 44 & 45 Vict. c. 58). And by secs. 175 (3) and 176 (3) such persons as may be serving in any troops or portion of troops raised in forces of the above-mentioned second class, are subjected to the Army Act when serving under the command of an officer of the regular forces.

The naval forces of the colonies, apart from the Imperial navy, have been put on a different footing since 1865, when an Act of the Imperial Parliament was passed—the Colonial Naval Defence Act, 1865, 28 & 29 Vict. c. 2, to enable the colonial legislatures to provide at their own cost, vessels of war, weapons, seamen, and volunteers for their own defence, and to raise a volunteer force to form part of the Royal Naval Reserve established by the Royal Naval Reserve Act of 1859, 22 & 23 Vict. c. 40.

By the Imperial Defence Act, 1888, 51 & 52 Vict. c. 32, an agreement made with the Australasian colonies was ratified, by which the Imperial and Colonial Governments in conjunction, and in a certain proportion of payment by each of the expenses, were to maintain, equip, and man a naval force to be employed in Australian waters, and provide defence for certain ports and coaling stations; the ships to be under the sole control and orders of the naval commander-in-chief on the Australasian station, but to be retained within the limits of that station, and only otherwise employed by consent of the colonial Governments.

See Todd, *Parliamentary Government in the Colonies*, ch. xii.; and articles ARMY; COMMISSION; OFFICER.

Colonial Lighthouses.—The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), repealed the earlier enactment relating to this subject (18 & 19 Vict. c. 91) by its 22nd schedule, and substituted the following provisions therefor.

Dues for Colonial Lighthouses.—Where any lighthouse, buoy, or beacon has been placed on or near the coasts of any British possession (*q.v.*) by the consent of the Legislature of that possession, Her Majesty may, by Order in

Council, fix, increase, diminish, or repeal the "colonial light dues" payable by the owner or master of every ship passing the same, and deriving benefit therefrom (s. 670, subs. (1)), provided that the Legislature of such possession has, by address to the Crown, or by act or ordinance, signified its opinion that the dues ought to be levied (*ibid.* subs. (2)).

Collection and Recovery of Dues.—The collection and recovery of colonial light dues are regulated, so far as the United Kingdom is concerned, by secs. 649–651 of the Merchant Shipping Act, 1894 (s. 671, subs. (1)). In each British possession such dues are to be collected by such persons as the governor may appoint, in accordance with the said provisions, or in such other manner as the Legislature of the possession may direct (*ibid.* subs. (2)).

Application of Dues.—Colonial light dues levied under the Act are to be paid over to the Paymaster-General (*q.v.*), at such time and in such manner as the Board of Trade direct (s. 672), and after deducting the expenses of collection are to be applied in payment of the expenses incurred in maintaining the lighthouse, buoy, or beacon in respect of which they are levied, and to no other purpose (s. 673).

Advances for Construction and Repair of Lighthouses.—The Board of Trade may raise such sums as are necessary for those purposes (s. 674, subs. (1)). Sums so raised may be advanced by the Treasury out of moneys provided by Parliament, or by the Public Works Loan Commissioners, or by any other persons on the terms contained in secs. 661–653 (s. 674, subs. (2)).

Accounts.—Accounts of all expenditure under these sections are to be kept as the Board of Trade direct, and laid annually before Parliament, and audited as may be directed by Order in Council (s. 675).

[See SCRUTTON, *Merchant Shipping Act*, 1894.]

Colonial Marriages.—All laws made or to be made by the Legislature of any of Her Majesty's possessions for the purpose of establishing the validity of marriages previously contracted therein, are to have the same effect within all parts of Her Majesty's dominions as within the place where they were made (28 & 29 Vict. c. 64). See AFFINITY; CONSANGUINITY; MARRIAGE.

Colonial Prisoner.—1. Owing to the vast extent of the British Empire, and the smallness of some of its possessions, and the convenience of permitting the collection in one place of prisoners from more than one colony, the Colonial Prisoners Removal Act, 1869, 32 & 33 Vict. c. 10, was passed, under which, subject to sanction by Order in Council, colonies may agree for the transfer of prisoners under sentence from one colony to another. The orders in force sanctioning such agreements made prior to 1890 are published in Statutory Rules and Orders, revised, vol. i. pp. 707–710, and those subsequently made are printed in the volume of Statutory Rules and Orders for the year in which they were made.

The Act is also applicable to places which, though not British possessions, are under British jurisdiction, as exercised by treaty or otherwise, and was, in 1884, applied to Cyprus (St. R. & O., revised, vol. i. p. 720).

2. Under the Fugitive Offenders Act, 1881, 44 & 45 Vict. c. 69, ss. 25, 28, and the orders made thereunder as to colonies and places under the Foreign Jurisdiction Acts, provision is made for the conveyance and legal custody of fugitives from British justice in colonies and posses-

sions and places to which British jurisdiction extends, in transit from the place to which they have fled to the place where they are to be tried or undergo sentence. The orders on this subject are collected under the titles "Foreign Jurisdiction" and "Fugitive Offender" in vol. iii. of the Statutory Rules and Orders, revised, and in the annual volumes of Statutory Rules and Orders.

3. The Colonial Prisoners Removal Act, 1884, 47 & 48 Vict. c. 31, empowers the removal of a prisoner under sentence of imprisonment for any offence to another British possession, or to the United Kingdom, in the following cases:—

- (a) Where the life of the prisoner is likely to be endangered or his health permanently injured in the possession where he is imprisoned.
- (b) Where the prisoner belonged, at the time of his offence, to the navy or army.
- (c) Where his offence was wholly or partly committed beyond the limits of the possession in which he is imprisoned.
- (d) Where there is no proper prison in which to undergo his sentence, or his safer custody or more efficient carrying out of his sentence renders removal expedient.
- (e) The Act also applies to criminal lunatics (s. 10), where the law of the possession makes the prisoner one of a class subject to removal under the Act (s. 2). See *ASYLUMS*, *ante*, vol. i. p. 394.

The prisoner, unless in the army or navy, if removed, may be returned, by order of the Secretary of State or the Government of the possession to which he was removed, and if required by the same authorities, shall be returned for discharge at the end of his sentence. On discharge in the place of removal, the offender is entitled to reconveyance free of charge to the place from which he was removed (s. 3). Provision is made for warrants and the cost of removal, dealing with the removed prisoner and the case of escape, and for proof of acts or concurrence of colonial governments (ss. 5–9, 11). The colonies may legislate for the purpose of carrying the Act into effect (s. 12), and regulations may be made by Order in Council as to removal of prisoners and criminal lunatics (ss. 4, 13). Those now in force were made in 1889 (St. R. & O., revised, vol. i. p. 720).

The Act may be applied to places under the Foreign Jurisdiction Acts (s. 15), and was so applied in 1889 to Africa (St. R. & O., revised, vol. iii. p. 280); in 1893 to the Pacific Islands (St. R. & O., 1893, p. 340); in 1895 to the Ottoman Empire (St. R. & O., 1895, p. 268); and in 1896 to South Africa (St. R. & O., 1896, p. 20). The procedure on removal is not well known, and difficulties have arisen in executing in England a sentence on a prisoner so removed (see 32 L. Jo. 146).

Colony.—A body of persons who form a settlement at a distance from the country to which they belong. According to Greek ideas, the colony was an independent State, connected with the mother-city chiefly by religious tie. The Roman *colonia* was a body of citizens under arms, stationed in one of the towns or strongholds of the empire, and possessing institutions modelled on those of Rome. In English law, the settlements formed by subjects of the Crown beyond seas were formerly described as forts, factories, and plantations (see *Lubbock v. Potts*, 1806, 7 East, 449, where it was held that Gibraltar was merely a fortress, and not a plantation within the meaning of the Navigation Acts). The older terms are now superseded

by the more general term "colony," which includes any part of Her Majesty's dominions, exclusive of the British islands and of British India (Interpretation Act, 1889, s. 18).

Settled and Conquered Colonies.—The distinction between colonies acquired by settlement and those acquired by conquest (*q.v.*) or cession (*q.v.*), was explained, in the year 1722, in certain resolutions of the Privy Council, reported 2 P. Wms. 75. A new country is said to be settled when, at the time of occupation, it is uninhabited or inhabited by people whose customs cannot reasonably be applied to Englishmen. In such a case, the settlers are deemed to carry with them the common law of England, and so much of the statute law in force at the time of settlement as may be found applicable to the circumstances of the country. Thus, for example, land is held under the Crown, subject to the ordinary incidents of freehold tenure, including escheat to the Crown on failure of heirs (*A.-G. for Ontario v. Mercer*, 1882, 8 App. Cas.); but it would not be reasonable to apply statutory rules designed to meet the special difficulties of an old country (*e.g.* the statutes restraining gifts of land for charitable purposes) to a new settlement (*Mayor of Lyons v. East India Co.*, 1836, 1 Moo. P. C. 272). Native customs ought not to be suppressed or wholly disregarded; the Indians in Upper Canada, for instance, are permitted to live under their own tribal authorities; but the Indian law is personal or tribal in its character; the territorial law of Upper Canada is English. The institutions of a new settlement have been formed in some cases by the acts of the colonists themselves; the king in council usually made provision for the establishment of executive officers and courts of justice, subject always to his own authority in Parliament. When a colony has acquired a legislative authority of its own, the powers of the king in council cease, unless in so far as they may have been expressly reserved. Even Parliament, though possessing undoubted authority to legislate for any part of the dominions of the Crown, respects the independence of colonial legislative authorities; its aid is invoked only when Acts are to be passed which transcend the local limits of colonial jurisdiction, such, for example, as the Act of 1867 by which the North American colonies were united under one federal constitution, or the Act of 1881, which permits appeals to be taken from British Honduras to the Supreme Court of Jamaica. For the powers of the Crown in regard to new settlements formed at the present day, see the British Settlements Act, 1887.

When a colony is acquired, by conquest or cession, from a civilised Power, the fact of conquest places it, for the time being, at the disposal of the Crown; the king in council may make provision for its government, subject always to his own authority in Parliament (*Campbell v. Hall*, 1774, 20 St. Tri. 304). When the colony acquires a permanent legislative authority of its own, the powers of the king in council cease, unless in so far as they are expressly reserved, and Parliament respects the independence of the local legislature, as in the case of a settled colony. If the laws of the State from which the colony is taken are not yet fully established, English law may be introduced; in Jamaica, for example, which is a conquered colony, the law is English in its origin. But where the inhabitants are in the enjoyment of rights guaranteed by a civilised system of law, it is considered just and politic to leave their local institutions undisturbed, and provisions for this purpose are usually inserted in the treaty of cession. Thus, the old French law was retained in Lower Canada, the Code Napoleon (*q.v.*) in Mauritius, the Roman Dutch law in Ceylon, British Guiana, and Cape Colony. In all these cases it may be observed that the local law has been

greatly modified by British influences. The penal codes of our conquered colonies have been remodelled on English lines; their mercantile legislation is more or less closely adapted to modern Acts of Parliament. It is also important to notice that the duties of executive officers in a British colony, and the relations between courts of justice and the executive, are usually defined and interpreted with reference to the principles of the English constitution. In the case of *Sir T. Picton*, 1804-12, 30 St. Tri. 225, the Roman Spanish law of Trinidad was cited to prove that the governor of that island might authorise the application of torture to a recalcitrant witness; but it was argued with much force on the other side that no foreign law could justify an act so inconsistent with British usages. In *Hill v. Bigge*, 1841, 3 Moo. P.C. 465, the old law of Trinidad was again relied on to prove that the governor could not be sued in the colony in respect of a private debt; but Lord Brougham, in delivering the opinion of the Judicial Committee, did not think it necessary to deal with this part of the argument.

Colonial Governors.—In each colony executive powers are intrusted to an officer appointed by the Crown. There were formerly chartered and proprietary colonies, in which the company or the individuals administering the country had power to appoint the governor; but the charters and patents which conferred this power are not now in force; the chartered companies now operating in South Africa and elsewhere are placed under the supervision of governors appointed by and directly responsible to the Queen. The practice is, to constitute the office of governor by letters patent; the holder of the office is appointed by commission; he is usually assisted by an executive council, and he is furnished with instructions as to the manner in which his duties are to be performed. In colonies possessing responsible government, the advisers of the governor are chosen from among the leaders of the party which commands a majority in the popular branch of the local legislature. Within the limits of colonial jurisdiction, the governor is bound to act on the advice of his ministers; where imperial interests are concerned, he must guide himself by the instructions which he receives from the Colonial Secretary.

It is now well settled that a colonial governor may be sued in the Courts of his colony (*Hill v. Bigge*, cited above). He may be sued in respect of acts done in his official capacity, but in this case the plaintiff must show that the acts complained of were illegal; if the governor was acting within his commission, he may plead "lawful authority" (*Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225, and 6 Q. B. 1; *Musgrave v. Pulido*, 1879, 5 App. Cas. 102).

Colonial Legislatures.—In respect of the constitution of the local legislative authority, the colonies may be divided into four groups—1. In five colonies there is no legislative council; the governor has sole power to make laws; in three of the five the Crown has reserved power to legislate by Order in Council. 2. In sixteen colonies there is a legislative council nominated by the Crown. In all the colonies of this class, except British Honduras, the Queen may legislate by Order in Council. 3. In nine colonies there is a legislative council partly elected; Cyprus, which is not a colony but a Turkish possession administered by Great Britain, has a legislature of this class. In three of the colonies of this class power is reserved to legislate by Order in Council. 4. Eleven colonies have elected assemblies and responsible governments.

No bill of a colonial legislature can become law unless with the assent of the governor; if he refuses, the bill is lost; if he assents, he must report the Act to the Colonial Secretary, and on the advice of the Colonial Secretary the Queen may disallow the law which has been made. If the

governor does not think fit to assent to the bill or to reject it, he may reserve it for the consideration of the Crown, and it will not become law until the Queen approves it.

Doubts were at one time entertained as to the power of colonial legislatures to pass Acts inconsistent with the principles of English law; but the 28 & 29 Vict. c. 63 has provided that no colonial law shall be deemed void on the ground of repugnancy to the law of England, unless it is repugnant to the provisions of some Act of Parliament, or regulation made under an Act of Parliament, extending to the colony.

Colonial Courts.—In almost every colony there is a Superior Court, exercising a jurisdiction analogous to that of the High Court in England. It was formerly not unusual for the governor in council to be constituted a Court of error; the governor also acted in some colonies as chancellor and ordinary. It is now more usual to provide for appeals within the colony, either by creating a Court of Appeal, or by establishing a Supreme Court, exercising appellate as well as original jurisdiction. The 53 & 54 Vict. c. 27 makes provision for the establishment of Colonial Courts of Admiralty and Vice-Admiralty.

From the highest civil Court of each colony appeals may be brought to the Queen in Council, subject to any limitation which may be imposed on the right of appeal by Order in Council or by local legislation. The limitations usually imposed are, that the subject-matter of the appeal must be of a certain value; that the judgment appealed from must be final, not interlocutory; that leave to appeal should be obtained in the colony within a certain time. Her Majesty retains the prerogative right to give special leave to appeal in cases where leave cannot be obtained in the ordinary way. Special leave has sometimes been given in criminal cases, but appeals in such cases should be admitted only when the colonial Court has exceeded the local limits of its jurisdiction, or when there is reason to apprehend that a serious miscarriage of justice has taken place. For conditions of appeal to the Privy Council, see PRIVY COUNCIL.

The judges of colonial Courts hold their offices, in some cases during pleasure, in other cases during good behaviour; but even if they hold during pleasure they are protected against arbitrary dismissal. See on this subject the Memorandum by the Lords of the Judicial Committee of the Privy Council, printed in the Appendix to 12 Moo. Ind. Ap.

Colonial Office.—In 1660 a committee of the Privy Council was appointed "for the Plantations"; this committee was afterwards united to the Council for Trade. In 1784, after the passing of Burke's Act, a committee for Trade and Plantations was appointed; this committee has developed into the Board of Trade (*q.v.*), and has now no direct connection with colonial affairs. Communications with colonial Governments were always under the supervision of a Secretary of State, and since 1854 there has been a separate Secretary of State for the Colonies.

[*Authorities.*—For the Colonial Office, and for particular information in regard to the colonies severally, see the *Colonial Office List*; see also the articles in this Encyclopædia devoted to the various colonies; Burge, *Colonial and Foreign Laws*; Clark, *Colonial Law*; Tarring, *Law Relating to the Colonies*, 2nd ed., 1893; Todd, *Parliamentary Government in the British Colonies*; etc.]

Colorado Beetle.—Provision was made for the exclusion and destruction of this insect by the Destructive Insects Act, 1877, 40 & 41 Vict. c. 68, and the following Orders made thereunder:—

(1) The Colorado Beetle Customs Order, 1877, which forbids the landing of potato haulm leaves or stalks imported from Canada, Germany, or the United States, and empowers the Commissioners of Customs to collect and destroy all sand direct, or refuse imported with potatoes from these countries, and to detain the potatoes till this is done.

(2) The Colorado Beetle Order, 1877, which forbids any person to sell, expose, or offer for sale, or to distribute in any manner, living specimens of this insect in any stage of its existence, and requires owners of crops of potatoes to give immediate notice to the local authority of the appearance on his crop of a Colorado beetle in any stage of existence. These Orders are printed in Statutory Rules and Orders, Revised, vol. ii. pp. 710, 711.

Colour of Office.—See OFFICE.

Colourable Alteration, Imitation.—See COPYRIGHT DESIGNS; PATENTS; TRADE MARKS.

Combat, Trial by.—See BATTLE, WAGER OF.

Combatants.—It is usual to distinguish the men composing a regular belligerent army into *combatants* and *non-combatants*; on capture by the enemy both are entitled to the rights of prisoners of war. See BELLIGERENT.

Combinations.—The term “combination” is most commonly used in English law with reference to questions of the legality of the association or union of two or more persons for some common purpose, such as protecting or furthering their own actual or supposed professional or commercial or industrial interests. In this sense it is generally employed as a term of approval for that which, when against law or public opinion, is styled “conspiracy.” And the legal or political right of combination is asserted as against stringent applications of the judicial doctrine of criminal conspiracy. The policy of English law as at present disclosed by the legislation or interpreted by the judges is said to lean against the imposition of any fetters on any combination or competition not accompanied by violence or fraud or other like injurious acts (*Mogul* case, 1889, 23 Q. B. D. 618, 628), and very many forms of combination are fully recognised by law, *e.g.* partnership, joint-stock companies, building, friendly and industrial and provident societies, or trade unions—the combination being legal if in accordance with the prescribed forms and created for a purpose which is not unlawful, in which neither offends against the criminal law, nor involves a contract which is made void or illegal by any common law rule or legislative provision, nor is inconsistent with the instrument which forms the act of association or charter of the association. When a combination is to do something forbidden by the criminal law it is punishable as conspiracy, and the word “combination” is occasionally coupled with “conspiracy” in criminal enactments. Other combinations which may not entail punishment as crimes are so far disapproved as to be held unenforceable agreements, *e.g.* agreements in restraint of trade (*Mogul* case [1892], App. Cas. 25), but are not necessarily actionable at the suit of outside persons prejudiced by

acts done in pursuance directly or indirectly of the combination (see Pollock, *Torts*, 3rd ed., 287), and the extent to which these combinations give rise to civil remedies after discussion in the *Mogul* case (*ubi supra*, and *Temperton v. Russell* [1893], 1 Q. B. 715) has now again been brought before the House of Lords and eight consulted judges in an appeal in *Flood v. Jackson* [1895], 2 Q. B. 21, and an authoritative solution may be expected from the reserved judgment of the law lords.

The first question is dealt with under CONSPIRACY. As to the second, the present rule appears to be that a combination for trade purposes formed by traders in their own interests is not unlawful, merely by the fact that it is an undertaking in concert by persons having a common interest, if the concert does not involve the doing of any act which would not be unlawful if done by a single person in his own sole interest. In other words, persons injured civilly by a combination of other persons cannot recover damage merely on the ground of a conspiracy or combination against them, but must show a legal wrong done them; and it is immaterial whether it is done by a sole tortfeasor or by joint tortfeasors.

In civil matters the words "conspiracy" and "conspired," apart from the writ of conspiracy now represented by the action for malicious prosecution, are (1) merely vituperative epithets, suggesting malicious joint action in the commission of a tort; (2) excuses for declining to answer questions or interrogatories on the ground that the alleged conspirators are not bound to criminate themselves (*Spokes v. Grosvenor Hotel Co.*, 1897, 13 T. L. R. 426).

And in civil pleadings the use of the word "conspiracy" or "combination" does not create any cause of action or do more than suggest malice where that is an element of the cause of action.

There is, it may be added, no legal distinction between combinations of employers or of workmen. Their legality or illegality is determined by the same tests; and any combined action which would be criminal in workmen is equally criminal in employers, such as the use of threats or violence or the making of black lists (see *R. v. Bauld*, 1876, 13 Cox, C. C. 282; *Curran v. Treleaven* [1891], 2 Q. B. 545; *Trollope v. London Building Trades Federation*, 1895, 12 T. L. R. 228, 280; *Lyons v. Wilkins* [1896], 1 Ch. 811). The history in England of trusts, syndicates, and unions of employers is not, as in America, published in detail in many reported cases; the industry of our law since the abolition of the offences of engrossing, forestalling, and regrating having been directed rather against combinations of workmen than of employers.

See BLACK LIST; CONSPIRACY.

Comity of Nations.—As the law of a State cannot be enforced beyond its territorial limits except by favour of the State which, by its Courts of law, is asked to respect it, a voluntary recognition of foreign law is involved, and has been ascribed to a supposed "comity" or courtesy of nations towards each other. Professor Dicey points out the "confusion of thought" produced by this "laxity of language" (*Conflict of Laws*, 1896, p. 10); and Ferguson in his *Manual of International Law* (vol. i. p. 145) endeavours to draw the following distinction between comity and private international law: "There is a difference between private international law and what is termed comity, though both originate in the goodwill, convenience, or policy of nations, deeming it advisable to grant to each other privileges which are not reciprocally due between States and thus not *stricti juris*. Comity, in a stricter sense, is the reciprocal exercise of politeness between Governments of

States, and has regard to matters of mere courtesy based on the general principle of the right of respect, or it comprehends some special voluntary acts, not due by treaty, which may serve to facilitate the interests of international policy of either party. To the latter category belongs also any privilege granted regarding direct and special correspondence between the respective Governments, whilst private international law includes modes of legal proceedings in the application of foreign laws, as adopted by legislative jurisprudence or by the jurisdiction of the law Courts, without any direct interference of the Executive Government, unless when established by special agreement between the respective States. In this sense private international law may be called the comity of law Courts, whilst comity itself is the *droit de convenance* between Governments." See INTERNATIONAL LAW.

Commandeer, Commando.—The commando is either the obligation to perform military duty under the Constitution of the South African Republic, or a force formed under its authority which all must join when ordered, or "commandeered," in pursuance of the obligation.

Article 23 of the Constitution, published in 1889, provides that in case of a hostile attack from outside, everyone, without distinction, shall be held bound to lend his assistance on the promulgation of martial law; and by article 66 this proclamation must be made in case of pressing danger by the President, with the assent of the members of the Executive Council.

Article 93 declares the military force to consist of all the men of the Republic capable of bearing arms, and, if necessary, of all those of the natives within its boundaries whose chiefs are subject to it; and the men of the white people capable of bearing arms are all men between the ages of sixteen and sixty years (art. 95).

By article 101, the military force, with the exception of the hired natives, is summoned for the maintenance of order, for commando duty on the occasion of home rebellion, and, without any exception, for the protection of the country, and to fight with foreign enemies.

Maintenance of order is to be understood (art. 103), as (*a*) the execution of the laws, the carrying out of sentences after receiving orders, and the consideration of measures of general and local interest; also the supervision of the natives, and the repression of vagrancy and vagabondage in the field - cornetcies: (*b*) commandos on occasion of rebellion among the natives; bringing Kaffir chiefs to their duty: (*c*) commandos for the suppression of disorders among the white population: despatching sufficient force to the district where disorder has broken out; and (*d*) defence of the country and carrying on war; carrying out martial law and taking the field at the head of the army.

Commander-in-Chief.—Until the year 1793 the administration of the army was in the hands of the sovereign in person; his orders in all matters relating to its internal discipline and regulation being communicated through the Secretary at War, an office now abolished, and whose duties have been transferred to the Secretary of State for War. To remove the army from the political influences with which its government was then associated, the executive office of general commanding-in-chief, or commander-in-chief, was created, in the above-mentioned year, in order that military promotions and appointments might be in the hands of a soldier, who would be influenced in making them by professional considerations alone.

The appointment is by patent, or a letter of service, signed by a Secretary of State; and the difference in the mode of appointment determines whether this officer is known as commander-in-chief, or as general commanding-in-chief. Thus from 1856 the Duke of Cambridge was known by the latter official designation until 1887, when a patent conferred upon him the title of commander-in-chief. The letter of service merely notifies an appointment "to serve as a general," and requires the officer to obey such orders as he shall receive from the sovereign, the commander-in-chief, or any other his superior officer.

The patent appoints him in terms to be "commander-in-chief, during our pleasure, of all and singular our land forces employed, or to be employed, in our service in the United Kingdom of Great Britain and Ireland"; and all officers and soldiers are commanded to acknowledge him as their commander-in-chief.

Since 1870, when an Order in Council placed the departments of the War Office under the ultimate control of the Secretary of State for War, the relation of the commander-in-chief, and his office, known as the Horse Guards, has been recognised as in complete subordination to that minister. This was emphasised by an Order in Council in 1888 separating the departments into a military and a civil side, both subject to the administrative control of the Secretary of State, as responsible for the exercise of the royal prerogative in respect of the army. Thus in that year the position of the commander-in-chief was that of sole military adviser to the Secretary of State for War. But in 1895 his position in regard to the Secretary of State was modified by an Order in Council of 21st November defining the duties of the principal officers to be charged with the administration of the departments of the army. Instead of being sole adviser in military matters, four chiefs of special departments are conjoined with him, over whom he exercises a general supervision; but each of whom separately advises the Secretary of State on all questions connected with the duties of his department. He is therefore the *principal* adviser of the Secretary of State on all military questions. By this Order he is charged with the general distribution of the army at home and abroad, with the preparation and maintenance of detailed plans for the mobilisation of the regular and auxiliary forces, with the preparation and maintenance of schemes of offensive and defensive operations, and with collecting and compiling military information; with selecting fit and proper persons to be recommended for appointment to commissions (*q.v.*) in the regular forces; with proposing fit and proper officers, whether of the regular or auxiliary forces, for promotion for staff and other military appointments, and for military honours and rewards.

The marines are not under the control of the commander-in-chief, but of the Admiralty (*q.v.*) (Army Act, 1881, 44 & 45 Vict. c. 58, s. 179). See the same Act *passim* for various specific provisions as to the commander-in-chief's powers in regard to courts-martial, to enlistment and discharge, etc.

The commander-in-chief of the forces in India is now vested with the powers of the commanders-in-chief of the Presidencies of Madras and Bombay, whose offices were abolished by the Madras and Bombay Armies Act, 1893, 56 & 57 Vict. c. 62. In regard to courts-martial, the expression commander-in-chief in the Army Act, 1881, applies to the Indian commander-in-chief, as far as relates to the British forces in India. And there are similar specific provisions in applying the Act to the Indian forces as have been referred to above.

Colonial governors are commanders-in-chief of the local forces of colonies. See COLONIAL FORCES.

The Act 11 Will. III. c. 12 provides that colonial governors and commanders-in-chief guilty of oppression of any of His Majesty's subjects, or of any other crime or offence contrary to the laws of this country, or of the country within their command, may be tried and punished in England by the Court of King's Bench or by special commissioners (*R. v. Picton*, 1806, 30 How. St. Tr. 226).

[*Authorities.*—See Clode, *Military Forces of the Crown*, vol. ii. pp. 335–358; Anson, *Law and Custom of the Constitution*, Part II. ch. viii.; Todd, *Parliamentary Government in the Colonies*, ch. xii.]

Commanding Officer.—In its military usage, the expression commanding officer includes an officer in command of every species of military unit—a corps, a regiment, a battalion, a troop, and so on. But the powers of a commanding officer to exercise certain functions of legal importance in regard to the administration of the Army Act, 1881, 44 & 45 Vict. c. 58, cannot be exercised by all officers to whom the term is applicable in the military sense. As to the relation of all these to the civil power, see article OFFICERS.

The Act itself does not define the term commanding officer, although, throughout, such officer is referred to for many purposes, and particularly for the purposes of investigating charges, and awarding summary and minor punishments. But the Rules of Procedure made in pursuance of the Army Act defines it (r. 128) when employed in the sections of the Act relating to “courts-martial,” to the “execution of sentence,” and to the “power of commanding officer,” and in the provisions consequent thereon, and in the rules themselves, as meaning, in relation to any person, the officer whose duty it is under Her Majesty's regulations, or, in the absence of any such provisions, under the custom of the service, to deal with a charge against that person of having committed an offence, that is, to dispose of it on his own authority, or refer it to a superior authority. It also means, for the purpose of summary award of fines for drunkenness, the officer commanding a troop, battery, or company. Thus an officer who would fall under the definition in this last class of cases would be excluded in reference to others, *e.g.* the case of “aggravated drunkenness” under secs. 44 and 46. So that, as regards the sections of the Act specifically referred to in the rule quoted, commanding officer means an officer superior in rank to those having power to make a summary award in cases of drunkenness; in fact, the officer commanding a corps, regiment, or battalion. But rule 16 of the Queen's Regulations, 1895, sec. vi., confers these powers of a commanding officer of a corps, a regiment, or a battalion upon the commanding officer of a detachment, which is a body of men drawn from several companies or regiments; only in this case, if the officer is below the rank of major he may be restricted in the exercise of these powers, including the power to convene regimental courts-martial.

In regard to other portions of the Army Act, 1881, than those already mentioned, rule 15 extends the definition to sec. 45, which relates to the duty of the commanding officer towards a person detained in military custody for more than eight days without a court-martial being held for his trial. Other sections are also included, but need not be specified, as it is only intended to show that in other parts of the Army Act than those mentioned in rule 128, where the term commanding officer is used, it may

from time to time by regulation have the same meaning as in that rule, and thus be limited by the definition. If not so limited, the proper officer to act may, nevertheless, be one who corresponds to the definition.

The commanding officer may either dismiss any charge (s. 46), or, in the case of an officer, refer it to a court-martial (see COURTS-MARTIAL), or, in the case of a soldier, punish summarily; but unless he decides to punish with a minor punishment, the soldier may elect to be tried by district court-martial. But he cannot punish summarily a warrant officer or a non-commissioned officer. See as to minor punishments, such as confinement to barracks, Queen's Regulations, 1895, sec. vi. para. 47. The offences which a commanding officer may dispose of summarily, by inflicting other punishments, or by regimental court-martial, without reference to superior authority, but subject always to the right of the soldier to elect for trial by district court-martial, are set out in certain sections of the Act mentioned in sec. vi. para. 39 of the above regulations. They involve punishment by imprisonment not exceeding fourteen days, or by fine, or deduction from pay. There is no appeal from the commanding officer's decision.

As to the powers of the commanding officer of one of Her Majesty's ships over officers and soldiers on board, see Order in Council, 6th February 1882, made under the "Act to make Provision for the Discipline of the Navy" (29 & 30 Vict. c. 109).

[See COURTS-MARTIAL; OFFICERS; *Manual of Military Law*, 1894.]

Commandite, from *commendare* in the sense of commend or confide (see word in Littré's *Dict.*), means strictly a loan to a person engaged in business.

In continental law it is a share in a partnership, the liability for which is limited to its amount. Thus in French *commandite* companies there are two kinds of partners, *associés en nom collectif*, or full partners, whose liability is unlimited, and "*commanditaires*," whose liability is limited to their holding in the concern. Enjoyment of limited liability is dependent upon the "*commanditaire*" taking no part in the management of the company's business. The *commandite* may take the form of negotiable shares or stock.

Commendam.—See IN COMMENDAM.

Comment, Fair.—See CRITICISM; DEFAMATION.

Commercial Court.—The Commercial Court is the Court presided over by the judge of the Queen's Bench Division who is in charge, for the time being, of the commercial list. It owes its existence to a resolution of the judges of the Queen's Bench Division, passed on 24th May 1894, by which it was declared: "That it is desirable that a list should be made of commercial causes to be tried at the Royal Courts of Justice by a judge alone, or by jurors summoned from the city, and that a Commercial Court should be constituted of judges to be named by the judges of the Queen's Bench Division."

In pursuance of this resolution a memorandum was issued by the

judges of the Queen's Bench Division in the early part of 1895, containing the following material provisions :—

1. Commercial causes include causes arising out of the ordinary transactions of merchants and traders ; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages.

2. A separate list for summonses in commercial causes will be kept at chambers. A separate list will also be kept for the entry of such causes for trial, but no cause shall be entered in such list which has not been dealt with by a judge charged with commercial business, upon application by either party for that purpose, or upon summons for directions or otherwise.

Commercial causes may be transferred from the Chancery Division to the Queen's Bench Division in accordance with the existing practice.

3. With respect to town commercial causes it is considered desirable, with a view to despatch and the saving of expense, that all applications shall be made direct to the judge charged with commercial business, and with respect to country commercial causes applications may by consent of the parties be made to him in like manner.

4. As to commercial causes already entered for trial, application may be made to such judge by either party to enter the same in the commercial cause list.

5. Applications in commercial causes under Order 14 shall be made as heretofore, but where leave to defend has been given such causes may be dealt with like other commercial causes.

6. Application may be made to such judge under the provisions of the Judicature Act, 1894, and the rules thereunder, or by consent, to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise.

7. Application may also be made to such judge, after writ or originating summons, for his judgment on any point of law.

8. Such judge may at any time after appearance and without pleadings make such order as he thinks fit for the speedy determination, in accordance with existing rules, of the question really in controversy between the parties.

9. Parties may, if they so desire, agree that the judgment or decision of such judge in any cause or matter shall be final.

10. Application may be made to such judge in urgent cases to fix an early day for the hearing of any cause or matter.

The Lord Chief-Justice of England (Lord Russell of Killowen), Mr. Justice Mathew, and Mr. Justice Collins were selected to take charge of the commercial business, in accordance with the above regulations; and Mr. Justice Mathew, in March 1895, undertook the duty of presiding over the first sittings of the Court.

The regulations contained in the memorandum of the judges of the Queen's Bench Division had not the authority of rules of Court. "The notice relating to such causes was not a rule made by authority, but a practice agreed on by the judges of the Queen's Bench Division, who have the right to deal by convention among themselves with the mode of disposing of the business in their Courts" (Lord Esher, M. R., in *Barry v. Peruvian Corporation* [1896], 1 Q. B. 208, at p. 209). Nor had the Commercial Court any powers which other Courts did not possess. "With respect to the Commercial Court there is no Act of Parliament establishing such a Court; it is a mere piece of convenience in the arrangement of business. The Commercial Court has no more power to dispense with strict evidence, or to depart from the administration of the law in the ordinary way, than any other judge or Court" (Lindley, L.J., in *Baerlein v. Chartered Mercantile Bank* [1895], 2 Ch. 488, at p. 491). It therefore became necessary for the judge who first took charge of the business of the Court to devise a procedure which, while in accordance with existing rules and orders, would commend itself to the commercial community as ensuring economy and despatch. The means which he adopted are thus described in the introduction to *Commercial Cases*, vol. i. pp. v-vii :—

"It was clear that, if the legal advisers of the parties were willing to assist the Court, commercial disputes might be settled as promptly by a judge as by an arbitrator. But to attain this end it was necessary that the judge should be made acquainted at the earliest possible stage of the proceedings with the nature of the plaintiff's and the defendant's case. This could only be done effectively if the respective solicitors made careful inquiry into the facts, and were so enabled to give the judge the fullest information. The commercial litigation of the country being in the hands of solicitors of high character and great professional skill, who were not likely to fail to conduct the cases intrusted to them in the best interests of their clients, they were relied upon to respond to any reforms designed to lead to despatch and prevent useless expense. . . . The course of procedure followed in chambers has been to ascertain, upon the making of the order for the transfer of the case to the commercial list, what directions were needed to secure a trial at the earliest convenient date. This has been done without difficulty. Commercial questions present themselves for the most part in similar shapes, and are readily defined. In former times pleadings in such cases generally followed common forms. As the result of this preliminary discussion before the judge, many cases have been put in train for settlement. When it has been found that the case must be tried, a note has been made by the judge of the questions which the parties have expressed their intention of raising, and a copy of this note has been furnished to each side, or a direction has been given that notice of the grounds of claim and defence should be exchanged. Interrogatories have seldom been asked for, and their absence has produced no inconvenience. In lieu of the affidavit of documents the parties have been directed, when it appeared to the judge to be necessary, to furnish lists of documents and to allow inspection. The affidavit of documents provided for by the rules often affords no security that a full disclosure has been made, and under the substituted procedure the responsibility is cast upon the solicitors, who, as officers of the Court, have been informed that the withholding of a material document will be treated as a breach of professional duty. Parties have not, in fact, been hampered by the disappearance of the affidavit of documents. A day is then fixed for the trial of the case, to the great convenience of solicitors, who can arrange for the attendance of their witnesses, no encouragement being given to technical or other obstruction. The practice of granting commissions for the examination of witnesses abroad, often resorted to formerly in commercial cases, and generally found to be of little practical value, has been very rarely followed; and mutual admissions, the exercise of the powers conferred by Order 30, r. 7, or the consent of the parties to permit the judge to act upon the materials submitted to mercantile arbitrators, have diminished the necessity for recourse to a method of obtaining information which is always dilatory and not unfrequently wasteful. Commercial cases have been tried upon the evidence prescribed by the orders made in chambers without difficulty or delay, and with a great diminution of the cost incidental to actions in which the ordinary modes of litigation are followed. The grasp which the judge obtains of the case in chambers, and the power which he consequently acquires to prevent the taking of steps which will not assist the Court at the trial, have been found to be of extreme value in securing expedition."

The only definition of a "commercial cause" is that which is contained in the general words of regulation 1 of the above-mentioned memorandum. It is for the judge in charge of the commercial list, sitting in chambers, to

say whether a particular case comes within the description given in that regulation.

Application may be made to the judge to have a case entered in the commercial list before the defendant has appeared; and, the case having been so entered, the defendant can only object to the order on the ground that the case is not a commercial cause (*Barry v. Peruvian Corporation* [1896], 1 Q. B. 208).

A case will not necessarily be transferred from the Chancery Division to the Commercial Court because it is a commercial cause; but the Court to which the application for a transfer is made, if satisfied that the case is likely to be tried more speedily and economically in the Commercial Court, will order it to be transferred (*Baerlein v. Chartered Mercantile Bank* [1895], 2 Ch. 488). As stated already, the judge of the Commercial Court has no greater power to dispense with the rules of evidence than any other judge (*Baerlein v. Chartered Mercantile Bank* [1895], 2 Ch. 488).

Commissary Court.—See CONSISTORY COURT.

Commission Agent; Merchant.—See BROKER; PRINCIPAL AND AGENT.

Commission Day.—See CIRCUITS.

Commission, Evidence on. — 1. *Supreme Court.* — Order 37, r. 1, provides that the Court or a judge may at any time for sufficient reason order that any witness, whose attendance in Court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; and rule 5 of the same Order provides that the Court or a judge may in any cause or matter, where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or a judge, or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct. Applications for commissions to take evidence are made under the last cited rule by notice of motion in the Chancery Division, by summons before a master in the Q. B. D., and by summons before a registrar in the Probate, Divorce, and Admiralty Division (Order 54, r. 12).

The application should be supported by affidavits showing the grounds for the application and the nature of the evidence to be given by the witnesses whom it is proposed to examine (see *Bidder v. Bridges*, 1884, 26 Ch. D. 1; 53 L. J. Ch. 479; 32 W. R. 445, and below).

An examination of a witness will be ordered under the last named rule whenever it is necessary for the purposes of justice, as where a witness is going abroad, or is from illness, age, or other infirmity unable to attend at the trial (*Warner v. Mosses*, 1880, 16 Ch. D. 100; 50 L. J. Ch. 28; 29 W. R. 201; *Bidder v. Bridges*, 1884, 26 Ch. D. 1).

A party to the cause may be examined under the rule (*Nadin v. Bassett*, 1883, 25 Ch. D. 21; 53 L. J. Ch. 253; 32 W. R. 70).

The rule does not empower the Courts to order the examination of

witnesses except where there is pending litigation between contesting parties (per Cave, J., *In re Hewitt*, 1885, 15 Q. B. D. 163; 54 L. J. Q. B. 402; 53 L. T. 156); and an order for a commission to take evidence abroad cannot be made in an arbitration under a submission, no action having been brought (*In re Shaw & Ronaldson* [1892], 1 Q. B. 91; 61 L. J. Q. B. 141).

A witness who has made an affidavit may be cross-examined thereon on commission if he is out of the jurisdiction (*Strauss v. Goldschmidt*, 1892, 8 T. L. R. 239).

There are four modes of conducting an examination of witnesses out of Court:—

- i. By an examiner of the Court.
- ii. By special examiner.
- iii. By commission.
- iv. By request to examine witnesses.

The first method is that usually adopted where the witness or party to be examined is within the jurisdiction of the High Court; and Order 37, r. 5, provides that an examination shall be before one of the examiners of the Court, unless the Court or a judge shall otherwise direct. Examiners of the Court are appointed by the Lord Chancellor. They must be barristers of not less than three years' standing (Order 37, r. 40). Examinations are distributed amongst them by rotation by the first clerk to the registrars of the Chancery Division (Order 37, rr. 41–43). The examiner appoints the time and place of the examination, and must continue it *de die in diem*, subject to such adjournments as he thinks necessary or just (Order 37, r. 45). The order contains the names of the witnesses to be examined, but additional witnesses may be examined by consent of all the parties (*ibid.* r. 46). The examiner is entitled to be paid his fees by the party prosecuting the examination. The rules provide a scale of fees (Order 37, rr. 50 & 51). He may have the assistance of an interpreter where necessary (*Marquis of Bute v. James*, 1886, 33 Ch. D. 157; 55 L. J. Ch. 658; 55 L. T. 133).

A special examiner or commissioner is usually appointed when it is desired to take evidence abroad. The practice seems to be to appoint a commission when the examination is to be taken upon written interrogatories and cross interrogatories, and a special examiner when it is to be taken *vidé voce* (see Hume-Williams and Macklin, *Evidence on Commission*, p. 13).

Any person may be appointed a commissioner or special examiner. (For form of Order and Writ of Commission, see R. S. C., Appendix K, Form 36, and Appendix J., Form 13).

Letters of request may be ordered in any case in lieu of a commission (Order 37, r. 6 A). These are letters addressed to all the judges of a foreign Court, requesting them to summon witnesses and examine them either upon interrogatories or *vidé voce*, and to return the answers in writing (see Forms 37 A and 37 B, Appendix K. to R. S. C., 1883).

Whether the examination takes place before an examiner of the Court, or a special examiner, or any other person, he must be furnished, by the party on whose application the order for an examination was made, with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to show what are the questions at issue between the parties (Order 37, r. 10).

The examination must take place in the presence of the parties, their counsel, solicitors or agents; and the witnesses must be examined in chief, and be subject to cross-examination and re-examination in the same way as if they were examined at the trial (Order 37, rr. 11 & 22). Where an effective

cross-examination cannot be had, a commission will be refused (*In re Boyse*, 1882, 20 Ch. D. 760; 51 L. J. Ch. 660; 30 W. R. 812).

The depositions are taken down by the examiner in writing and read over to, and signed by, the witness, or, if he refuses, by the examiner.

The examiner has no power to decide upon the materiality or relevancy of any question. If a question is objected to, he must write down the question in the depositions, and must state his opinion thereon to the counsel, solicitors, or parties, and must refer to such statement in the depositions (Order 37, r. 12). If a witness object to any question, the question and the objection are to be taken down by the examiner and transmitted by him to the Central Office, so that the validity of the objection may be decided by the Court or a judge (Order 37, r. 14).

When the examination of a witness is concluded the original depositions authenticated by the signature of the examiner are transmitted by him to the Central Office and there filed (Order 37, r. 16); and he must also, if need be, make a special report to the Court touching such examination and the conduct or absence of any witness or other person (Order 37, r. 17).

Any officer of the Court or other person directed to take the examination of any witness or person may administer oaths (Order 37, r. 19), and a commission to a single commissioner abroad should authorise him to administer an oath to himself (*Wilson v. De Coulon*, 1883, 22 Ch. D. 841; 31 W. R. 839).

The deposition cannot, unless the Court or a judge so direct, be given in evidence at the trial without the consent of the party against whom the same is offered, unless the Court or a judge is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend. When so admissible the depositions certified under the hand of the person taking the examination (whose signature need not be proved) is admissible, saving all just exceptions (Order 37, r. 18).

(a) *In England and Wales*.—The usual grounds for ordering the examination of a witness in this country are, that the witness is about to go abroad, or is from illness, age, or other infirmity likely to be unable to attend the trial (*Warner v. Mosses*, 1880, 16 Ch. D. 100; 50 L. J. Ch. 28; 29 W. R. 201; 43 L. T. 401).

That the witness is seventy years of age is generally a *prima facie* ground for taking his evidence before an examiner (*Bidder v. Bridges*, 1884, 26 Ch. D. 1; 53 L. J. Ch. 479; 32 W. R. 445). But in a case where it was proposed to take the evidence of a very large number of witnesses, and the trial of the action was not likely to be long deferred, the order was confined to those above seventy-five without prejudice to further applications to examine any particular witnesses between seventy and seventy-five upon the ground of illness or infirmity (*ibid.*).

It is not the practice to appoint a special examiner to take a country examination, even, for instance, in a Welsh case where it is alleged to be necessary that the examination should be taken by a person conversant with the Welsh language (*Marquis of Bute v. James*, 1886, 33 Ch. D. 157; 55 L. J. Ch. 658; 34 W. R. 754).

The attendance of witnesses is secured by *subpœna ad testificandum* or *duces tecum* in the same way as at the trial (Order 37, r. 20), and the Court or a judge may make an order *ex parte* for the attendance of any person for the purpose of producing any document named in the order, the production of which could be compelled at the trial (Order 37, r. 7, *In re Smith* [1891], 1 Ch. 323; 60 L. J. Ch. 328; 64 L. T. 253); and a person who wilfully disobey an order requiring his attendance for the purpose of being

examined or producing any document, may be committed for contempt of Court (Order 37, r. 8, and Order 44). Witnesses are entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial in Court (Order 37, r. 9).

(b) *In Scotland, Ireland, India, and the Colonies.*—There are three ways of taking evidence in the Queen's dominions outside the jurisdiction of the High Court. (1) By a special examiner appointed under Order 37, r. 5. The attendance of witnesses may be compelled by serving a written notice signed by the commissioner; and if this is disobeyed, by making application to the Superior Courts of the country in which the disobedience occurs (6 & 7 Vict. c. 82, and 22 & 23 Vict. c. 20). (2) By mandamus directed to an Indian or Colonial Court (13 Geo. III. c. 63, ss. 40, 44, and 45; 1 Will. IV. c. 22, ss. 1 and 2). (3) By letters of request addressed to a Court or judge in India, or the Colonies, or elsewhere in Her Majesty's dominions. In such case the Court or judge so requested may appoint a person to take the examination (48 & 49 Vict. c. 74, s. 2).

Whether the examination is by commission, mandamus, or letters of request, any witness or person may be examined on oath, affirmation, or otherwise, according to the law in force at the place where the examination is taken (48 & 49 Vict. c. 74, s. 6).

(c) *In Foreign Countries.*—There are three ways of taking evidence on commission in foreign countries, viz.: (1) By special examiner, (2) by commissioner, (3) by letters of request.

It is usual where the examination is to be *visd voce* to have a special examiner; and where it is to be by written interrogatories, a commissioner. In certain countries it is unlawful for a private person to administer an oath, and in these the only available procedure is by letters of request. It seems that in Germany and Spain letters of request are the only available method (Hume-Williams and Macklin, *Evidence on Commission*, p. 54).

Before an order will be made for taking evidence abroad the Court must be satisfied that it is necessary for the purposes of justice, and the interests of all parties must be considered.

It must be shown (1) that there is some good reason why the witnesses cannot be brought to this country to be examined at the trial (*Larson v. Vacuum Brake Co.*, 1884, 27 Ch. D. 137; 54 L. J. Ch. 16; 33 W. R. 186). If the witnesses are resident abroad, and their presence in Court is not essential, it is enough to show that it will be much less expensive to examine them abroad than to bring them here (*Coch v. Allcock & Co.*, 1888, 21 Q. B. D. 178; 57 L. J. Q. B. 489; 36 W. R. 747). But if from the nature of the case it is important that the witness should give his evidence and be cross-examined in Court, an order will not be made unless it be shown clearly that the witness cannot possibly attend here (*In re Boyse*, 1882, *ubi supra*; *Berdan v. Greenwood*, 1880, 20 Ch. D. 764; 46 L. T. 524). It must be shown that the application is made *bond fide*, and not for the purposes of delay or embarrassment, or with a view to avoiding full cross-examination (*In re Boyse, ubi supra*; *Langen v. Tate*, 1883, 24 Ch. D. 522; 32 W. R. 189).

It must be shown that the witnesses are material, and that the Commission is not a mere roving inquiry to give the party a chance of finding evidence abroad (*Armour v. Walker*, 1883, 25 Ch. D. 673; 53 L. J. Ch. 413; 32 W. R. 214).

In the exercise of its discretion the Court will not regard the case of a defendant with the same strictness as the case of a plaintiff who has chosen his own forum (*Ross v. Woodford* [1894], 1 Ch. 38; 63 L. J. Ch. 191; 42 W. R. 188; 8 R. 74).

2. *In Divorce Cases.*—Where a witness is out of the jurisdiction of the

Court, or where by reason of his illness, or from other circumstances, the Court shall not think fit to enforce the attendance of the witness in open Court, the Court may order a commission on a requisition addressed to the judges of a foreign Court to issue for the examination of such witness on oath upon interrogatories or otherwise, or if the witness be within the jurisdiction may order the examination of such witness before an officer of the Court or other person (20 & 21 Vict. c. 85, s. 47). Application is made to the registrar by summons, or in undefended cases without summons. Any of the parties may apply by summons to the registrar for leave to join in a commission or requisition and to examine witnesses thereunder (Divorce Rules, 129-136, 189; Browne and Powles on *Divorce*, 5th ed., pp. 332-335).

3. *In Bankruptcy Proceedings* the Court may in any matter take the whole or any part of the evidence by commission abroad. An order for a commission or letter of request to examine witnesses and the writ of commission or request follow the forms for the time being in use in the High Court, with such variations as circumstances may require (46 & 47 Vict. c. 52, s. 105 (5); Bankruptcy Rules, r. 67).

4. *County Courts*.—The judge may order, where it shall appear necessary for the purposes of justice, an examination of witnesses to be taken before the Court or any officer of the Court or any other person at any place in England or Wales. Where the witness resides out of the jurisdiction of the Court, the judge may appoint the registrar of the Court of the district in which the witness resides to take the examination. In other respects the circumstances in which an examination may be ordered, the procedure, and the use that may be made of the depositions is nearly the same as in the High Court (see 51 & 52 Vict. c. 43, s. 164; and County Court Rules, Order 18, rr. 14-28).

The order for examination may be applied for by notice for directions or by *ex parte* application, or on notice in writing (*ibid.*, Order 15, rr. 1 and 4; Order 12, r. 11a; see *Annual County Court Practice*, 1897, p. 205).

5. *In the Mayor's Court, London*, and other Courts to which the Borough and Local Courts of Record Act, 1872, applies, a judge of the High Court may, on the application of any of the parties to any pending action, order a commission to issue for the examination of witnesses upon oath at any place beyond the limits of England and Wales by interrogatories or otherwise (35 & 36 Vict. c. 86, s. 2 and schedule).

And by the Mayor's Court of London Procedure Act, 1857, 20 & 21 Vict. c. clvii. s. 26, that Court may order a commission to issue for the examination of witnesses upon oath at any place or places beyond the limits of England and Wales (see Form in Glyn and Jackson, *Mayor's Court Practice*, 2nd ed., p. 210). By sec. 24 of the same Act the Court may order an examination before the registrar or other person of any witness in any part of England and Wales.

6. *Evidence for Foreign Tribunals* is taken in England under 19 & 20 Vict. c. 113, and 33 & 34 Vict. c. 52, s. 24. An order appointing an examiner will be made on *ex parte* application on affidavit. The same procedure is followed when evidence is to be obtained for a British tribunal out of the jurisdiction under 6 & 7 Vict. c. 20, s. 1.

[*Authorities*.—See *Annual Practice*, 1897, Notes to Order 37; and *The Taking of Evidence on Commission*, by Hume-Williams and Macklin, 1895.]

Commission (In Army and other Forces).—The commission issued by the Crown to a person to serve as an officer in

any of the land or sea forces confers a public office; and the purchase or sale thereof was therefore illegal at common law. By 49 Geo. III. 1809, c. 126, s. 7, however, the sale and purchase of commissions in the army, at such prices as should be fixed by regulation, was legalised, but not to any further extent. Otherwise all buying and selling of and receiving money for civil, naval, or military commissions, and all negotiations in respect thereof, were made misdemeanours. In 1871 a royal warrant cancelled all previous regulations fixing the prices at which any commission might be purchased, sold, or exchanged, or in any way authorising the purchase or sale or exchange for money of any such commission. The Regulation of the Forces Act, 1871, 34 & 35 Vict. c. 86, appointed commissioners for allotting compensation out of the public funds to officers on their retirement who, when the royal warrant was issued, held saleable commissions; in some cases over regulation prices being permitted to be paid by the commissioners. The powers of the commissioners were extended to officers serving in certain Indian corps, who would have received money according to custom on retirement (37 & 38 Vict. c. 61).

In the navy and royal marines the sale of commissions had not been authorised in any way by regulations; and after the Act of George III., above mentioned, they were unsaleable as being illegal; in the navy the purchase system has never existed.

The Regimental Exchange Act, 1875, 38 Vict. c. 16, authorises Her Majesty to regulate from time to time exchanges to be made by officers of the regular forces from one regiment or corps to another, and excepts changes so made from the provisions of the Army Brokerage Acts, which are defined as the Act 5 & 6 Edw. VI. c. 16, and the above-mentioned Act of George III. All officers on promotion or exchange must sign a declaration that they have not paid, or promised to pay, by themselves or others, any money or money's worth, or received any payment as consideration in respect of such exchange or promotion. By sec. 155 of the Army Act, 1881, 44 & 45 Vict. c. 58, every person, except the Army Purchase Commissioners, and persons acting under their authority, who negotiates, acts as agent for, or otherwise aids or connives at, the sale or purchase of any commission in the regular forces, or gives or receives any valuable consideration in respect of any promotion in, or retirement from, such forces, or employment therein, or any unauthorised exchange, is liable on conviction on indictment, or information, to a fine of £100, or imprisonment not exceeding six months; and if an officer, on conviction by court-martial, to be dismissed the service.

Since the abolition of purchase, the majority of first commissions in the army are now given to successful candidates in open competitive examinations for entrance to one of the royal military colleges. After finishing their course of instruction there, and serving a period with the regiment to which they are appointed, they receive a commission to a second lieutenancy, and this commission is antedated by one or two years, according to the place they obtained in the final examination of the college. University students who have passed certain examinations are exempt from the competitive examinations, unless there are more applicants than vacancies; Queen's cadets, and pages of honour, who are appointed to the college by a Secretary of State, only pass a qualifying examination.

Non-commissioned officers, specially recommended, and lieutenants of militia, after a competitive examination, receive first commissions as lieutenants. In the navy similar regulations are prescribed for candidates for commissions.

Commissions in the non-combatant branches of the army and navy are granted in accordance with the regulations prescribing the appropriate professional qualifications.

The 25 & 26 Vict. c. 4 provided that by Order in Council all commissions in the land forces of the Crown might be issued without the Royal Sign Manual, with the signature of the commander-in-chief and a principal Secretary of State; and in the case of the royal marines, of the Admiralty; and in the case of military chaplains and commissariat and store-officers, of a principal Secretary of State. The Regulation of the Forces Act, 1871, s. 6, provided that the commissions of officers in the militia, yeomanry, and volunteers should be held from Her Majesty, and be prepared, authenticated, and issued in the same manner as commissions in the land forces of the Crown, and first commissions are to be given to persons recommended by the lieutenants of counties. The provision of the Act of Settlement, 12 & 13 Will. III. c. 2, prohibiting the commissioning of aliens, is repealed by the Naturalisation Act, 1870, 33 & 34 Vict. c. 14, where a certificate of naturalisation, in accordance with that Act, has been obtained.

Commissions in the army, or navy, or royal marines and militia cannot be resigned without leave; but the power of dismissal at pleasure is a constitutional prerogative. See as to resignation of commission, *Ex parte Cumming*, 1887, 19 Q. B. D. 13, and cases cited in *Manual of Military Law*, 1894, p. 271; and as to dismissal at pleasure, *Dunn v. R.* [1896], 1 Q. B. 116. Nor will a remedy be given by the civil Courts on account of injuries which affect only the professional status of officers; therefore they will give no redress for dismissal, deprivation of rank, or reduction or deprivation of pay. See also *Mitchell v. R.* in 1890, reported as a note to *Dunn v. R.*, *supra*, where it was held that no engagement made by the Crown with any of its military or naval officers, in respect of services, either present, past, or future, can be enforced in any Court of law.

An officer may be cashiered or dismissed the service for various offences by sentence of court-martial; Army Act, 1881, s. 44, and Navy Discipline Act, 1866, 29 & 30 Vict. c. 109, s. 52.

By 7 Will. IV. and 1 Vict. c. 31, officers of the army and marines in case of the demise of the Crown hold their commissions until cancelled, although under 6 Anne, c. 41, s. 8, commissions generally continue for six months afterwards.

A member of the House of Commons who accepts for the first time a commission in the army or navy must resign his seat, but may be re-elected (6 Anne, c. 41, s. 25). The acceptance of a new commission, however, does not vacate his seat (s. 27). The same rule is extended to the acceptance of a commission in the marines. A member who accepts a first commission in the militia, yeomanry, or volunteers does not vacate his seat (52 Geo. III. c. 68, s. 176; 44 Geo. III. c. 54, s. 58; 26 & 27 Vict. c. 65, s. 5; 36 & 37 Vict. c. 77, s. 6; May's *Parliamentary Practice*, 10th ed., 611; Rogers on *Elections*, Part II., 16th ed., 16, 63, 68). See ARMY and OFFICERS.

Commission In Lunacy.—See LUNACY.

Commission of Assize.—See CIRCUITS.

Commission of the Peace.—A document in which are enrolled the names of the persons appointed to act as justices of the peace for a county, borough, or other district, and in which the nature of their jurisdiction is defined. In strictness, the authority of county justices was of a purely statutory origin; but by inveterate usage the commission is held to warrant them in the exercise of jurisdiction, not expressly if impliedly given by any of the statutes under which their appointment or powers were authorised or defined (see JUSTICE OF THE PEACE). The form was settled about 1327, on the institution of the office, temp. Edw. III. It continued in use (subject to the modification prescribed by 27 Hen. VIII. c. 24) until 1590, when a new form was settled by the judges (Lambarde, *Eirenarcha*, c. 9, p. 43), which is to be found in Lambarde, *Eirenarcha*, c. 8, in Latin, and in Burn's *Justice*, 30th ed., vol. iii. p. 111, in its latest version. The Elizabethan form continued in use until 1878, when a new form was prescribed by rules made in 1878, under the Crown Office Act, 1877 (40 & 41 Vict. c. 41), and printed in Statutory Rules and Orders, Revised, vol. i. p. 587. Until 1835, justices in corporations derived their jurisdiction from charter or prescription (see Lambarde, *Eirenarcha*, p. 26), and not from a commission of the peace. Since that Act, except in the city of London, borough justices (except the mayor and latest ex-mayor) can sit only under a commission of the peace (5 & 6 Will. IV., c. 76, ss. 98, 107). That in use for boroughs is prescribed by the Rules of 22nd Feb. 1878, made under the Crown Office Act, 1877, and is printed in Statutory Rules and Orders, Revised, vol. i. at p. 590.

The commission continues until superseded or renewed. At common law demise of the Crown determined the commission; but now under 1 Anne, St. 1, c. 8, the justices can act on their old commission for six months after the demise of the Crown. A man's right to sit as justice is not altered by his promotion to any title of honour (1 Edw. VI. c. 7).

Commissions of the peace are prepared by the clerk of the Crown in Chancery, an office now (under the Great Seal (Offices) Act, 1874) united with many others in the Lord Chancellor's Secretary of Presentations. They are printed on parchment with blanks to be filled up, and the names of the justices are inserted in a schedule, which has a space for inserting the names of justices appointed after the issue of the commission, and are now generally issued under the Wafer Great Seal, except in the Duchy of Lancaster, where they are issued under the Duchy Seal (27 Hen. VIII. c. 24, s. 5). Clerks of the peace and town clerks must send to the clerk of the Crown in Chancery, in January in each year, a statement of the justices who have qualified, and, so far as they know, of those who have died during the preceding year, and a record of all justices is kept at the office (Rules of 22nd Feb. 1878; St. R. & O., Revised, vol. i. p. 594).

Prior to 1871, before a justice could act under the commission, it was necessary for him to take the prescribed oath, which was done before others, under commission to swear in the fellow-justices by a Court of *dedimus potestatem* (Lambarde, *Eirenarcha*, c. 10, p. 52), directing some person to swear in the new justices, and certify the oath to the clerk of the Petty Bag. The functions of this official as to commissions of the peace were transferred to the clerk of the Crown in Chancery by the Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81). The fee for issue of the writ was 2s. 6d., under the Petty Bag Rules of 1849 (St. R. & O., Revised, vol. vii. p. 731). The writ contained in schedules the oaths to be administered.

These have been superseded, except that as to qualification, by the Promissory Oaths Act, 1868, and the writ has been rendered unnecessary by the Promissory Oaths Act, 1872 (34 & 35 Vict. c. 48, s. 2).

Commissioners (Charity).—There are four Charity Commissioners, three of them being paid, and two at least of these three (one of the two being the Chief Commissioner) must be barristers of not less than twelve years' standing at the date of their appointment. No paid Commissioner can sit in the House of Commons during tenure of office. As to powers of, see CHARITY COMMISSION, and, generally, CHARITIES.

Commissioners for Oaths.—By the Commissioners for Oaths Act, 1889, the power of appointing commissioners for oaths in England is vested in the Lord Chancellor, sec. 1 of that statute empowering him to issue commissions to practising solicitors "or other fit and proper persons." In practice only solicitors who have been on the rolls for six years are appointed, and by the form of commission now in use the appointment lasts only so long as the person holding it continues in practice as a solicitor. Application for the appointment is made to the Lord Chancellor by petition, supported by certificates of fitness from two barristers, two solicitors, and six householders. If the application is entertained, the commission (which requires a £5 stamp) is issued, but, before being acted upon, it must be registered with the Incorporated Law Society, a registration fee of one shilling being payable.

By virtue of his commission a commissioner for oaths may administer any oath or take any affidavit (see EVIDENCE) for the purposes of any Court or matter in England, including any of the ecclesiastical Courts or jurisdictions (s. 1, subs. 2), but it appears that he cannot take the affidavit required prior to the issue of a marriage licence, nor declarations under the Ballot Act and Corrupt Practices Act. He is, moreover, forbidden to act in any proceeding in which he is engaged as solicitor, or clerk to such solicitor, or in which he is interested (s. 1, subs. 3). For administering an oath he is entitled to a fee of one shilling and sixpence, and in respect of each exhibit to an affidavit a fee of one shilling.

The Commissioners for Oaths Acts of 1890 and 1891 extend the powers of commissioners to certain specified matters.

The Lord Chancellor may revoke any commission (s. 1 of 1889 Act), and this power of revocation extends to commissions granted by a common law Court prior to the Judicature Act, 1873 (*Ward v. Gamgee*, 1891, 65 L. T. 610).

[*Authorities.*—See Stringer, *Oaths and Affirmations*, 2nd ed.; R. S. C. Order 38, rr. 4, 5, 16, 17, and notes in *Annual Practice*.]

Commissioners in Lunacy.—See ASYLUMS, *ante*, vol. i. p. 381. Other bodies of Commissioners will be found dealt with under BAIL PIECE; IMPROVEMENT COMMISSIONERS; LAND TAX; HARBOURS; LIGHT-HOUSES; TURNPIKE ROADS; WOODS AND FORESTS, and similar headings.

Commissions.—See PRINCIPAL AND AGENT.

Commissions of War.—See PRIVATEERING.

Commissions Rogatory (*Fr. Commissions rogatoires*).—Commissions by which evidence is obtained for the Courts of one country by the agency of the tribunals of another country. This is the mode of procuring evidence from foreign countries in all countries, it would seem, with the exception of Great Britain, her colonies, and the United States.

The commission is addressed by the Court of one country to the Court of the other through the Foreign Offices of the two countries. The Rules of the Supreme Court make provision for a similar procedure under the name of letters of request. See as to taking evidence in Her Majesty's dominions in relation to civil or commercial matters pending before foreign tribunals, 19 & 20 Vict. c. 113 (extended to criminal matters of a non-political nature by 33 & 34 Vict. c. 52, s. 24), COMMISSION, EVIDENCE ON.

Commit Suicide.—Where a policy of insurance contains a proviso vacating it in the event of the insured "committing suicide, or "dying by his own hand," or "perishing by his own hand," these terms are practically synonymous (*Dufaur v. Professional Life Co.*, 1858, 25 Beav. 602; *Borrodale v. Hunter*, 1843, 5 Man. & G. 639; *Clift v. Schwabe*, 1846, 3 C. B. 437); and the policy will be avoided if the assured take his own life voluntarily, with a knowledge of the physical character and consequences of his act, whether he is beneficially interested in it or not (same authorities). See LIFE INSURANCE; LUNACY; SUICIDE.

Commitment is a warrant or order of a Court, or a justice of the peace, directing a ministerial officer, such as sheriff, bailiff, or constable, to take a named person to prison, whether on remand, or to await trial or during trial, or in execution of judgment or sentence, and directing the governor or gaoler of the prison to detain him for the period and purpose specified, and to produce or discharge him at its termination. Where an arrest is made without warrant by a constable or private person, though the supposed offender is taken into custody, his conveyance to a gaol or lock-up is not a commitment in the proper sense; and under the present course of criminal justice a person so arrested does not go to prison until after he has been before a justice.

Its old name was a *mittimus*. Except perhaps in the earliest times a commitment has always been in writing, and since the Habeas Corpus Act, 1679, and the effective enforcement by the Courts of that remedy, a written commitment is now necessary to justify a gaoler in accepting a prisoner, and no gaoler can safely accept one on an oral direction, except from a Court of record (see Burn, *Justice*, 30th ed., vol. i. 851).

Since 1404 (5 Hen. IV. c. 10) commitment to private custody has been illegal; and all commitments must be to the common gaol, and there alone can a prisoner be detained, unless he is too ill to be taken there, or the gaoler will not take him from the officer (*Dalton, Country Justice*, c. 170; Burn, *Justice*, 30th ed., vol. i. p. 847). The changes effected by the Prison Acts of 1865 and 1877 have in form only and not in substance altered the old-established rule; since the numerous orders issued by the Home Office (and collected in St. R. & O., Rev., vol. v. pp. 647-657) have merely

the effect of providing what prison is to be regarded as the common gaol for any given district. The gaoler to whom the commitment is addressed must receive the prisoner, unless the commitment is bad on the face of it (see 4 Edw. III. c. 10; Dalton, *Country Justice*, c. 170).

Every commitment must state the cause for which it is made, *i.e.* the offence in respect of which the prisoner is to be detained. If this was not done, at common law the gaoler was not liable for letting the prisoner escape; and now he might be subject to an action for false imprisonment if he detained the prisoner on such a commitment (2 Co. Inst. 52). It should also state when and where it is made (2 Hale, P. C. 123; Hawk., P. C., bk. ii. c. 16; *R. v. Bowdler*, 1851, 17 Q. B. 243). If treason or felony is plainly expressed in the warrant, not necessarily with all the particulars (see *Jones v. Gorman* [1897], 1 Q. B. 374), the commitment is certainly valid (31 Chas. II. c. 2, s. 2). In cases of felony, though perhaps not of treason (*R. v. Despard*, 1798, 7 T. R. 736), it is expedient, if not essential, to specify the special nature of the felony, and to make the ground of commitment particular and certain, so that the prisoner may know the ground of his detention, and the High Court be enabled to judge of its legality on application for *habeas corpus* (*De Groenvell's case*, 1697, 1 Raym. (Ld.) 213). If the charge is a misdemeanour it must now be expressed with equal plainness. The reason that stress is not laid on this in the Habeas Corpus Act is that at that date misdemeanour was in most, if not all, cases bailable as of right, and commitments for misdemeanour, if made, were either illegal or could be got over by a *habeas corpus* to obtain bail. A general commitment to prison to answer such things as, should be charged against the prisoner has always been as illegal as a general warrant. See 2 Co. Inst. 591; *Entick v. Carrington*, 1765, 19 St. Tri. 1029.

A commitment by a justice out of Quarter Sessions must be under his seal or it will be invalid (1 Hale, P. C. 583). Commitments by a justice are not avoided by his death or vacation of office (42 & 43 Vict. c. 49, s. 37). They may be executed on Sunday if in respect of an indictable offence, but not where they are meant merely to enforce a penalty (29 Chas. II. c. 7, s. 6; *Ex parte Eyngton*, 1854, 2 El. & Bl. 747).

Commitment on Remand.—The form of a warrant commitment on remand in the case of indictable offences is scheduled to the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42 (Form Q. 1), and the form for offences punishable summarily is scheduled to the Summary Jurisdiction Rules, 1886 (Form 10) (St. R. & O., Rev., vol. vi. p. 644). In each case there is a direction to the gaoler to produce the prisoner at the adjourned hearing.

Commitment for Trial.—The forms of commitment for trial for an indictable offence are scheduled (Forms H. & T. 1) to the Indictable Offences Act, 1848. Each contains a direction to the gaoler to keep the prisoner till delivered in due course of law. The gaoler has to give a receipt for the prisoner to the officer who brings him to gaol (Form T. 2), and to insert the prisoner's name in the calendar for the next sittings of the Court for trial whereat he is committed. See CALENDAR OF PRISONERS.

Commitment in Execution.—The commitment in execution is quite distinct from the judgment, order, or conviction of the Court, being the authority to constables and gaolers to take and hold the offender, that the sentence of the Court may be enforced. (a) The forms of commitment for offences punishable on summary conviction are prescribed under the Summary Jurisdiction Rules, 1886 (St. R. & O., Rev., vol. vi. p. 644), which

take the place of the schedule to the Summary Jurisdiction Act, 1848. They are so framed as to apply to all the cases in which a justice has power to commit to prison (see Forms 29, 30, 31 (in lieu or in default of distress), 32 (penalty), 33 (imprisonment), and 34). (b) In the case of convictions by a Court of record a written commitment is not essential. Indeed, in case of sentence of death for murder no commitment is made out, and a mere minute of *sus. per col.* (*suspendatur per collum*) is written on the indictment. The record itself, or the memorial thereof, which may at any time be entered of record, or an oral command *sedente curia*, are regarded as sufficient without any warrant under seal (1 Hale, P. C. 504; *Kemp v. Neville*, 1862, 10 C. B. N. S. 523; *Watson v. Bodell*, 1845, 14 Mee. & W. 70). (c) As to commitments for contempt, see CONTEMPT OF COURT.

The mode of questioning the validity of a commitment is by writ of *habeas corpus* in all cases in which the prisoner is not held in execution. Where he is so held by order of a Court of summary jurisdiction, the usual course is to apply for a writ of *certiorari* (*q.v.*) if the conviction on which the commitment is founded can be questioned; or for a *habeas corpus* (*q.v.*) if the commitment only is bad.

If the commitment is made wholly without jurisdiction, a justice is, but a judge of the High Court apparently is not, liable to an action for false imprisonment (*Anderson v. Gorrie* [1895], 1 Q. B. 668).

Where a man is held under a commitment based on a conviction in a Court of record, a writ of *habeas corpus* cannot be obtained except as ancillary to a writ of error (31 Chas. II. c. 2, s. 2).

To enable a prisoner to know why he is detained, he is entitled to have a copy of his commitment within six hours after demand (31 Chas. II. c. 2, s. 5). This enactment extends to commitments under which persons are brought from outside England into England (*Sedley v. Arbouin*, 1800, 3 Esp. 174). And no application for a writ of *habeas corpus* will be entertained unless a copy of the commitment is produced to the Court, or its absence accounted for.

Under the present procedure the Court will not be punctilious as to minor formal defects in a commitment if on examination of the facts on which it was founded they prove to be sufficient to justify a commitment in proper form; and a good commitment by justices can always be substituted for a bad one if the conviction is good (42 & 43 Vict. c. 49, s. 36). The cases on the technical view of the law are collected in Burn's *Justice*, 30th ed., 870-881.

Where the commitment is in erroneous exercise of jurisdiction, but not malicious, the committing justice cannot be sued (*Kemp v. Neville*, 1862, 10 C. B. N. S. 523).

There is no modern precedent in the High Court of interference with a commitment on remand or commitment for trial in England for the purpose of quashing it, or except for the purpose of getting bail. In the case of committal for trial by a coroner, or an inquisition of murder or manslaughter, if the inquisition is quashed, an order to quash the commitment follows as of course, though technically it must be effected by a writ of *habeas corpus* (*R. v. Clerk of Assize of Oxford Circuit* [1897], 1 Q. B. 370). And in the case of commitments for trial abroad or in the colonies under the Extradition Acts or the Fugitive Offenders Act, 1881, the High Court will direct the release of the prisoner, whether the commitment is formally valid or not, if the depositions on which it is founded do not justify extradition under the Acts and treaties (see *R. v. Portugal*, 1885, 16 Q. B. D. 492 *n.*). See EXTRADITION; HABEAS CORPUS.

[*Authorities*.—Hawk., P. C., bk. ii. c. 16; Burn, *Justice*, 30th ed., vol. i. 843–888; Short and Mellor, *Cr. Off. Pr.*; Paley on *Convictions*, 7th ed., 263–281.]

Committed for Trial.—This expression means committed to prison with a view of being tried by a judge or jury, whether under secs. 22 or 25 of the Indictable Offences Act, 1848, or by a Court, judge, coroner, or other authority having power to commit any person to prison with a view to his trial, and includes persons admitted to bail upon their recognisance to appear and take their trial before a judge or jury (Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 27). This definition, though it applies in terms only to Acts passed since 1890, expresses the generally understood meaning of the term defined.

Committee (of Lunatic).—See LUNACY.

Committitur Piece.—An instrument in writing on parchment, and filed with the officer who acted as clerk of the judgments, charging a person (already in the Queen's Prison) in execution at the suit of the same person who caused his arrest in the first instance. The Queen's Prison was discontinued in 1862 (25 & 26 Vict. c. 104), and Holloway Prison substituted (28 Vict. c. cxvii.). The older procedure is given in full detail in 5 Petersdorff, 575, and Tidd's *Practice*, and its most recent form in Chitty's *Archbold*, 14th ed., 1194. Since the Debtors Act, 1869, imprisonment for debt being almost wholly abolished, proceedings by committitur appear to be obsolete or very rarely admissible (see Chit. *Archbold*, 14th ed., 1195).

Commixture is one of the recognised forms of *accession of property* (*q.v.*), and denotes the mixture of solids, as distinguished from *confusion* (*q.v.*), which denotes the mixture of liquids and *specification* (*q.v.*) where the mixture results in the creation of a new species. Commixture may happen in three ways: (1) with the consent of all the owners of the goods; (2) intentionally by the act of one or more against the will of the others; and (3) accidentally or without fault on anyone's part. The principles of English law governing these cases are entirely at one with those of Roman law (see Justinian, *Ins.* 2. 1. 27, 28; Bracton, bk. ii. c. 2). So long as the intermixture continues, the respective proprietors are possessors in common, with a right to claim their respective shares, taking into account any differences of quality or value, or, at all events, an account thereof (*Jones v. Moore*, 1841, 4 Y. & C. C. 351; *Buckley v. Gross*, 1863, 3 B. & S. 566). If the intermixture takes place against the will of an owner he may, if his goods are separable or can be identified, follow them up directly (*Colwill v. Reeves*, 1811, 2 Camp. N. P. 575; *In re Hallett's Estate*, *Knatchbull v. Hallett*, 1880, L. R. 13 Ch. D. 696); but if the goods cannot be identified, or only with great difficulty, then a different rule prevails, and there will be a right to claim a proportion of the mixture or its value (*Lupton v. White*, 1808, 15 Ves. 432; *Cook v. Addison*, 1869, 38 L. J. N. S. Ch. 322; *In re Hallett & Co., Ex parte Blane* [1894], 2 Q. B. 237), which last case seems to greatly modify the ancient rule that the party

wronged might claim the whole mixture when the wrong-doer was unable to separate the parts (*Lupton v. White* ; *Colewill v. Reeves*, both *supra*).

Common. •

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Common is a right or privilege which one or more persons have to take or use some part or portion of that which another person's lands, waters, woods, etc., produce (*Cruise*, 65). The most important right of this kind is common of pasture; other rights of the same nature are commons of estovers (see *ESTOVERS*), piscary (see *PISCARY*), and turbary (see *TURBARY*). The difficulties which attend the investigation of this branch of our law are due partly to economic and partly to historical causes. In the Middle Ages large tracts of the country—perhaps amounting to one-half of all England—were cultivated in common fields divided into strips. The inhabitants of the villages held a number of scattered strips in different parts of their common fields, of which there were usually two or three, and tilled them according to a customary system of agriculture. When the corn was not growing the owners of the strips enjoyed over the entire fields certain rights of pasture, which varied considerably in different localities. The writs which were used to enforce these rights in the open fields were the same as those used to enforce rights of common of pasture over waste lands. The judges were thus required to apply a single standard to two entirely different sets of circumstances. Their decisions, as reported in the Year Books, are, in consequence, often seemingly contradictory; and only by a collating (which yet remains to be done) of the reports with the plea rolls can their true import be ascertained. The common field system no longer exists, and rights of pasture are now seldom found, except upon waste lands. Yet it is upon these very decisions, which often refer solely to common in open fields, that the modern law of common of pasture is based.

Common of pasture is of four kinds, namely: Common Appendant, Common Appurtenant, Common *pur cause de vicinage*, and Common in Gross.

Common Appendant.—Common appendant is a right of common which became annexed to a tenement by operation of law independently of an express grant. If before the Statute of *Quia Emptores* a man enfeoffed another of lands parcel of his manor in socage, the law presumed without express words a grant of sufficient pasture in the waste for the beasts *levant* and *couchant* on such lands. "Common appendant is of common right, and commences by operation of law, and in favour of tillage, and therefore it is not necessary to prescribe therein, as it would be if it were against common right, but it is only appendant to ancient arable land, hide and gain, and only for cattle, *scilicet*, horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and therefore it is against the nature of a common appendant to be appendant to meadow or pasture" (*Tyrringham's case*, 1584, 4 Co. 36, a).

But although such common could formerly only be claimed as appendant to arable land, the law is now less strict in this respect; and where an

immemorial enjoyment of a right of common has been proved it will be presumed to be annexed to land anciently arable. But it must be expressly pleaded that the land was anciently arable, and a claim to common appendant made in respect of meadow or pasture land, without pleading that it was anciently arable, will still be bad. A claim has, indeed, been successfully made for a right of common appendant to a cottage, but the decision which allowed it was based upon the fact that a statute of 31 Elizabeth declared that every cottage should have four acres of land "to be continually occupied and manured therewith" (*Emerton v. Selby*, 1703, 2 Raym. (Ld.) 1015). This Act was repealed in 1775, and it is probable that no such claim could now be maintained.

In common appendant the number of cattle which a commoner is entitled to put upon the waste is determined by the number *levant* and *couchant* upon his land. These words *levant* and *couchant* have been differently interpreted by the judges. Thus Willes, C.J., stated that the tenant can only have a right of common for such cattle as are *levant* and *couchant* on his estate, that is, for such and so many as he has occasion for to plough and manure his land in proportion to the quantity thereof (*Bennett v. Reeve*, 1740, Willes, 231). In *Scholes v. Hargreaves* (1792, 5 T. R. 48) Buller, J., said that levancy and couchancy "means the possession of such land as will keep the cattle claimed to be commoned during the winter; and as many as the land will maintain in the winter so many shall be said to be *levant* and *couchant*." It is remarked by Serjeant Woolrych, in his treatise on *The Law of Rights of Common*, that there is not often any substantial disagreement between these two methods of regulation, since it usually happens that the average produce of a farm will afford a sufficient maintenance during the winter for the cattle which have been serviceable in tilling the land. In the case of *Carr v. Lambert* (1866, L. R. 1 Ex. 168) the Exchequer Chamber held that levancy and couchancy was rather the measure of the capacity of the land than a condition to be actually complied with by the cattle lying down or getting up, or by their being fed off the land; and affirmed a decision of the Court of Exchequer to the same effect. A person having a right of common appendant cannot sell or assign his right, but he may borrow cattle for the purpose of manuring his land and may use the pasture with them.

Common appendant is not extinguished by a commoner purchasing a part of the land subject to his right, and the common is apportioned because it is of *common right* (Co. Litt. 122 a). See also *Lord Dunraven v. Llewellyn* (1850, 15 Q. B. 791), and Williams on *Real Property*, 18th ed., App. F.

Common Appurtenant.—Common of pasture appurtenant is a right claimed by grant or prescription to pasture cattle on the land of another. It arises by act of parties, and not by operation of law. Unlike common appendant, it may be claimed for donkeys, goats, swine, and geese, as well as for commonable beasts, that is, for oxen, cows, horses, and sheep. The grant or prescription may include a fixed number of beasts, or it may be confined to cattle *levant* and *couchant* on the lands of the commoner. But it cannot be claimed for cattle *sanz nombre* (*Benson v. Chester*, 1799, 8 T. R. 401); and the early cases in which that expression is used must be taken to refer to claims for beasts *levant* and *couchant*. Common appurtenant may be claimed as appurtenant to meadow or pasture as well as to arable land; but it cannot be claimed as appurtenant to a house without any land (*Scholes v. Hargreaves*, *supra*). But a right of common appurtenant for cattle *levant* and *couchant* on a tenement formerly in a condition to support cattle is not extinguished by its conversion to other purposes, if the tene-

ment is still in such a condition that it might easily be turned to the purpose of feeding cattle (*Carr v. Lambert, supra*). Common appurtenant may be apportioned where a part of the land in respect of which it is claimed has been alienated. But if the commoner purchases any part of the land over which his right extends, he loses his right over the whole land (*Wild's case*, 1610, 8 Co. 79). But unity of possession is not of itself sufficient to effect an extinguishment. Thus, in the case of *R. v. Hermitage* (1692, Carth. 240), it was held on the facts that there was no extinguishment of common; "for where an unity of possession doth extinguish a prescriptive right, 'tis requisite that the party should have an estate in the lands *a qua* and in the lands *in qua*, equal in duration, quality, and all other circumstances of right."

Arable lands cultivated in the common field system were sometimes called shack fields. The tenants of such land enjoyed, as has already been stated, rights of common, which were, in general, rights of common appurtenant. Where it still exists, the adjoining tenements are held in severalty, until after harvest time, when the boundaries of the tenements are removed, so as to enable the cattle of each tenant to pasture on the stubble and grass edges of the tenements of the other tenants during the autumn and winter months. At the time of sowing the tenements are again held in severalty. This kind of common, which formerly prevailed in the eastern counties, admits of many varieties. But owing to the Inclosure Acts of the present century it is now seldom met with.

The distinctions between common appendant and common appurtenant do not seem to have been recognised in early times. Mr. Scrutton, in *Commons and Common Fields*, has shown that the two expressions are used indifferently in the Year Books of Edward III., and there is no clear distinction between commons appendant and appurtenant before the year 1462. The early history of common, however, is a subject which is still wrapt in considerable obscurity, and research may yet explain several early decisions which are seemingly inconsistent.

Common by reason of Vicinage.—A common *pur cause de voisinage* is said to exist where the inhabitants of one or more adjoining manors have been accustomed to intercommon with one another from time immemorial. The vills or manors must be adjoining one another, so that if one vill lies between two others, each of these two vills may intercommon with the vill between them, but not with each other (*Dyer*, 47 b). In *The Commissioners of Sewers v. Glass* (1874, L. R. 19 Eq. 134), Sir George Jessel stated that neither party can put on the commons more beasts than his own common will maintain; so that if there was a vill with a large common and a vill with a small common, the owner of the land in the vill with the small common could not put on the entire common more beasts than the small common could maintain. Each class claiming this kind of common is only entitled to put its beasts on its own common, and to allow them to stray on to the adjoining common. It cannot drive or put its own beasts into the adjoining common in the first instance. Common *pur cause de voisinage* is explained in *Tyrringham's case (supra)*, as existing in law for the sake of avoiding the suits which would arise if each party could bring an action when the cattle of the other strayed on to his part of the waste.

Common in Gross.—Common in gross is a right of common unconnected with the ownership of land. It may be claimed either by grant or prescription, and either for an unlimited number of beasts or for beasts *sanz nombre*. The latter expression, however, must not be taken literally. All that it means is that the person in whom the right is reposed is entitled to place

as many beasts on the waste as the waste will maintain, in addition to those of the persons who enjoy rights of common appendant and appurtenant on it. A right of common appurtenant for a certain number of beasts can become a right of common in gross by an express grant, with a reservation of the tenement to which it was appurtenant. But neither common appendant nor common appurtenant for cattle *levant* and *couchant* on a commoner's land can become so changed (*Drury v. Kent*, 1603, Cro. (2) 14). Although common in gross may be claimed by prescription, it would seem from *Shuttleworth v. Le Fleming* (1865, 19 C. B. N. S. 687) that the Prescription Act, 1832, has no application to such a right.

Copyholders as Commoners.—A copyholder being at law a mere tenant at will cannot claim common by prescription in his own name, for prescription implies an enjoyment of a right from time immemorial, that is, from the first year of Richard I., and for long after that date the interest of a copyholder in his land was not protected by law. But in cases where a copyholder claims a right of common in lands other than those of his lord, he is allowed to prescribe in the name of his lord. If he wishes to claim such a right in the waste of the lord, he is, instead of prescribing, permitted to claim by alleging a custom within the manor that all the copyhold tenants of the manor have the same right. This is the only case in which common or any profit *à prendre* can be claimed by custom. The number of beasts which copyholders can by custom put upon the waste is usually limited by *levancy* and *couchancy*; but sometimes it is limited by a scale, and varies according to the size of the tenements to which the right is annexed. At common law, when the lord of a manor enfranchises a copyholder, the latter loses his right of common in the wastes of the manor. But if a copyholder enjoys a right of common outside his manor, his right is not lost by enfranchisement. It is also expressly provided by the Copyhold Act, 1894, that an enfranchisement under that Act shall not deprive a tenant of any commonable right to which he is entitled in respect of the land enfranchised; but where any such right exists in respect of any land at the date of the enfranchisement thereof it shall continue attached to the land, notwithstanding the land has become freehold. Similar provisions were contained in Acts of 1841 and 1852.

Rights over the Waste.—Strictly speaking, the lord of a manor can have no right of common over his waste, because common is a right *in alieno solo*. But as owner he can put as many beasts there as he pleases, so long as he leaves sufficient pasture for the commoners; and subject to the same restriction, he can grant licences to strangers to put their beasts upon the common (*Smith v. Fecrell*, 1674, 2 Mod. Rep. 7).

Though the lord is owner of the soil, the commoners are entitled to remove every obstruction to their cattle grazing upon the wastes. They may therefore remove hedges, gates, or walls erected to impede them in the exercise of their rights. But they may not meddle with the soil. Thus in *Cooper v. Marshall* (1757, 1 Burr. 259), the lord put rabbits upon land subject to a right of common, and the commoners then filled up the burrows. Upon the lord bringing an action of trespass, the defendants pleaded that they so acted in order to abate a nuisance. The Court held that the lord had a right to put rabbits upon the common; but if he surcharged it in this way, the commoners could seek a remedy by action. So, too, if a lord of a manor plant trees upon the land subject to a right of common, a commoner has no right to abate them. The act of planting is, according to Eyre, C.J., an original right in the soil, prior to that of common, which is only concurrent with it (*Kirby v. Sadgrove*, 1797, 1 Bos. & Pul. 17).

The public as such have, except in some cases by statute (*e.g.* under the Commons Act, 1876), no right to use common lands for the purpose of recreation and exercise. But the inhabitants of a village may establish a right to dance or play games, or to sport upon lands by custom or by grant, but not by prescription. The leading cases on the subject are *Abbot v. Weekly* (1665, 1 Lev. 176) and *Fitch v. Rawlings* (1795, 2 Black H. 393).

Inclosure and Improvement.—In order to inclose a common or to extinguish a right of intercommonage, it was formerly, in the absence of a special custom, necessary that the consent of all the commoners should be obtained. If any of them were under disabilities, this method could not be adopted, and a private Act of Parliament was required. The Inclosure (Consolidation) Act, 1801, and another Act passed in 1836 greatly facilitated the inclosure of open and arable fields by private Acts: and the Inclosure Act, 1845, which dealt with wastes as well as with common fields, enabled several inclosures to be comprised in a single bill. This last Act has been amended and extended by numerous subsequent statutes. The powers which it conferred upon commissioners appointed under it are now exercised by the Board of Agriculture.

In the years 1866 and 1869 Metropolitan Commons Acts were passed to prevent the inclosure of commons in the neighbourhood of London, and to provide for their management and regulation (see METROPOLITAN COMMONS). In 1876 another statute was enacted, intituled the Commons Act, 1876, which amended the Acts relating to the inclosure of commons, and provided for the regulation and improvements of commons when uninclosed by means of the machinery of provisional orders. In considering the expediency of an application for a provisional order the commissioners are to take into consideration the question whether the application will be for the benefit of the neighbourhood. Commons situate within six miles of a town, having a population of not less than five thousand, are called suburban commons, and are subject by the Act to special regulations for the benefit of inhabitants of the town.

In many manors the lord has, by special custom, a power to grant portions of the waste with the consent of the homage to be held by copy of court roll. The newly created tenant as a rule enjoys the same rights of common as the existing copyholders, but in some manors it is the custom that they shall not be entitled to rights of common upon the waste. The procedure in making an inclosure in this way differs considerably in different manors. The right of the lord to make such grants is of a different nature from the lord's right of approvement under the Provisions of Merton. These provisions, together with sec. 46 of the Statutes of Westminster the Second, enabled the lord to inclose portions of the waste for his own benefit, so long as sufficient pasture, together with ingress and regress, was left to the commoners. The Statute of Westminster the Second expressly excepted certain improvements from its operation. It declared that by reason of a windmill, sheepcote, dairy, *augmentacionis curie necessarie aut curtillagii* no man should be grieved by an assize of novel disseisin of common of pasture. A special custom for the lord, with the consent of the homage to grant out portions of the waste to be held by copy of court roll, does not preclude him from exercising his right of approvement (*Duberley v. Page*, 1788, 2 T. R. 391), the right to "approve being superior to the custom, and derived from the common law." The power of the lord to approve has been curtailed by the Law of Commons Amendment Act, 1893, which declares that an inclosure or approvement of any

part of a common purporting to be made under the Statute of Merton and the Statute of Westminster the Second, or either of such statutes, shall not be valid unless it is made with the consent of the Board of Agriculture.

See also ADMEASUREMENT; COPYHOLD; INCLOSURE ACTS; METROPOLITAN COMMONS; PASTURE; PRESCRIPTION; LIMITATION; STINT.

[*Authorities.*—Elton, *A Treatise on Commons and Waste Lands*, 1868; Scrutton, *Commons and Common Fields*, 1887; Woolrych, *The Law of Rights of Common*, 1824; Cruise, *A Digest of the Laws of England*, vol. iii (Title 23), 1835; Joshua Williams, *Rights of Common*, 1880.]

Common Assault.—See ASSAULT.

Common Assurances.—See ASSURANCES.

Common Bench.—See SUPREME COURT.

Common Carrier.—See CARRIER.

Common Council.—See LONDON (CITY).

Common Employment.—See EMPLOYERS' LIABILITY.

Common Informer.—See APPROVER; PENALTY.

Common Law.—This term, in its largest sense, now means the whole body of legal principle and usage which is common to all parts of England, and now to all jurisdictions whose law is of English origin. But it has been and still is used with several meanings of different extent, and the choice among them has usually to be determined by the context, which, however, is seldom a matter of difficulty. It first appears as a synonym for *leges et consuetudines Angliæ*, the general law of England administered by the King's Superior Courts—"that law by which proceedings and determinations in the King's ordinary Courts of Justice are guided and directed" (Black. Com. i. 68). Hence various particular applications have proceeded.

A. As occasion arises to contrast the rules of this law with those of other jurisdictions recognised as authoritative in their own sphere, and entitled to judicial notice, we find the following kinds of rules distinguished from and opposed to the common law.

1. Local customs, such as those which regulate the descent of copyhold, and, in Kent and in some exceptional cases elsewhere, freehold lands.

In one of the earliest Year Books, 20 Edw. I. pp. 321, 327, 329 (A.D. 1292), we find that land descendible according to the regular course of primogeniture is said to be "en la comune lay," and this is opposed to "la especial ley," i.e. the custom of partible inheritance relied on by the plaintiffs in the case.

2. The rules administered by special jurisdictions, as those of the

Spiritual Courts, of the Admiral, of the Forest Courts, and of the law merchant so long and so far as it was a distinct and different body of rules.

3. Especially, after the rise of equity jurisdiction, the system of justice outside and supplemental to the jurisdiction of the King's Bench, Common Pleas, and Exchequer, which was administered under the king's authority, and exercised through the Chancellor, the Master of the Rolls, and later other judges specially established or empowered in that behalf. Hence the current antithesis of common law and equity, which has not ceased to be current in England since the former powers and authorities of the king's courts at Westminster and the Court of Chancery have been united in the Supreme Court of Judicature, nor, it is believed, in other English-speaking jurisdictions where analogous changes have taken place. We no longer speak of an "action at law" and a "suit in equity," but the practical division of business and learning remains much what it was.

B. But "common law," as the law of the king's judges, is also taken in a more limited sense as *consuetudines* rather than *leges*, the rules of law which are not created or declared by express enactment but developed by the Courts from principles founded in the "custom of the realm," or deemed so to be: "such laws as were generally taken and holden for law before any statute was made to alter the same" (*Termes de la Ley, s.v. Common Ley*). In this sense common law is opposed to statute law, though many statutes enacted by the Legislature have been and may be, as is said, "in affirmance of the common law," making no change in the substance of the law, but defining in authoritative terms rules that were already recognised. In particular, the old "common law pleading" is opposed to reformed systems of procedure introduced by modern legislation, or what is called "code pleading" in the United States.

The phrases "at common law," "by the common law," may be referable either to sense *A.* in any of its branches or to sense *B.*

C. When we look beyond England and the countries which have derived their law from England, we need a compendious term to distinguish the whole body of their jurisprudence and judicial system from the laws and judicial usages prevailing or influential in other lands, and in particular from the Roman law. For this purpose we speak of the "common law" in an extended sense, meaning the English or Anglo-American system at large, and either disregarding or subordinating the internal contrasts already mentioned. In this sense California, for example, is none the less a common law jurisdiction because a much greater part of the law has been reduced to a statutory form than in England. "Common law" and "civil (*i.e.* Roman) law" are the most usual members of the antithesis. As a rule, we say "the law of England" or "English law" when the contrast is with some other particular municipal system, such as modern French law, though there would be nothing incorrect in speaking of "the common law" for the purpose of such a comparison.

It will be observed that the characteristics of the common law system consist in judicial and forensic traditions and usage in the conduct of judicial business, quite as much as in positive rules of law. Public and oral argument, oral examination of witnesses, conduct of causes by the parties or their advocates, subject to the standing rules, in their own way and at their own risk, and open delivery of judgment after hearing the cause in open Court, are among its main features. "In most continental countries," on the other hand, "exist systems which retain traces of procedure based on Roman and canon law, which prevailed in the Middle Ages; systems which dispense almost entirely with oral evidence, and under which the judge

intervenes at every stage, and the witnesses, if any, are the witnesses rather of the Court than of the parties" (J. Macdonell in *Journ. Soc. Comp. Legist.* i. 247). The procedure of our courts of equity was derived from that of the canon law in the first instance, but has been largely assimilated to the methods of the common law even where there has not been any formal amalgamation.

In some British colonies "the common law of England" has been expressly declared by statute or ordinance to be the local law (see, e.g., *Journ. Soc. Comp. Legist.* i. 368, 375). The expression would seem in such cases to include the principles and rules of equity, and perhaps those of Admiralty jurisdiction so far as applicable. There are a few colonies, such as Trinidad, where the law of the original settlers has been superseded by the introduction of different portions of English law and procedure from time to time, until there is practically none of the older system left, but the law of England has never been adopted as a whole. It seems not strictly correct, though it would be substantially so, to say that such colonies are under the common law.

It was formerly held by the best American lawyers, and even said in the Supreme Court of the United States, that there is no such thing as a common law of the United States distinct from the common law as received and developed in the several States of the Union; but the prevalent opinion is now the other way (see vol. i. p. 242 of the present work).

As to the early forms and history of the term, we find mention in the Lombard capitularies formerly ascribed to Pepin, King of Italy, about A.D. 800 (Canciani, i. 181; Pertz, *Mon. Germ.* i. 192), if we may trust the text, of the "~~lex~~ communis" laid down by Charles the Great, in contrast with the personal law ("lex sua") of Lombards or Romans. No such phrase is known to occur in English documents before the twelfth century. The Latin version of Edward the Elder's laws quoted by Blackstone (*Com.* i. 65), where "jus commune" stands for "fole-riht," comes from Lambard's *Archæionomia* (A.D. 1568) and is Lambard's own (it is rightly criticised by Spelman, *Gloss.* p. 329). "Jus commune" was, however, a phrase well known to the canonists in the early Middle Ages (see Pollock and Maitland, *Hist. Eng. Law*, i. 155). In the Dialogue of the Exchequer (about A.D. 1180, i. 11, *ad fin.*) we read of the forest law: "Legibus quidem propriis subsistit; quas non communi regni jure sed voluntaria principum institutione subnixas dicunt"; and in ii. 22 the question is considered whether the sheriff may distrain a defaulting lord's goods "juxta communem aliorum legem." So that the Anglo-French "commune lei" seems to translate the "communis lex" found in the language of canonists, and the English "common law" to represent the Latin or French indifferently. For thirteenth-century examples, see Pollock and Maitland, *Hist. Eng. Law*, i. 157.

Common Lodging - House.—There is no definition of common lodging-houses in the Acts under which they are regulated, and the meaning of the term has been the subject of elaborate consideration by the law officers (see Glen, *Public Health Acts*, 6th ed., pp. 155-157). The nearest statutory definition is that of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34, s. 116), which defines a "public lodging-house" as one in which persons are harboured or lodged for a single night, or for less than a week at a time, or any part of which is let for less than a week. This definition applies equally well to a hotel. The accepted definition for purposes of registration is "a house, or part of a house, where persons of

the poorer classes are received for gain, and in which they use one or more rooms in common with the rest of the inmates, who are not members of one family, whether for eating or sleeping" (*Langdon v. Broadbent*, 1877, 37 L. T. 434; *Booth v. Ferrett*, 1890, 25 Q. B. D. 87).

A house in which lodgers are received in separate rooms for the night, but in which there is no common room, seems not to be a common lodging-house, though it may be subject to regulation as a lodging-house or tenement house, or as a seamen's lodging-house. See LODGING-HOUSE.

The regulations for common lodging-houses outside the county of London are under different Acts from those applicable to London. In each case they are in addition to the general provisions of the Public Health Acts.

Country.—Every urban or rural sanitary authority, *i.e.* borough council, or urban or rural district council, must keep a register in which are to be entered the names and addresses of the keepers of every common lodging-house in their district (38 & 39 Vict. c. 55, s. 76). No such house may be kept unless or until the keeper is so registered (s. 77) (as to which, see *Coles v. Fibbens*, 1885, 52 L. T. 358); nor can it be registered until after inspection and approval by an officer of the authority (s. 78). The keeper must, if required by the authority, affix and keep undefaced and legible in a conspicuous place outside the house the words "registered common lodging-house" (s. 79). The authority is bound to make and enforce by-laws—(1) fixing the number of lodgers, and separating the sexes; (2) for cleanliness and ventilation; (3) for notices and precautions in case of infectious disease; (4) the well ordering of the such houses. Model by-laws were prepared in 1877 by the Local Government Board, with a memorandum as to the houses to which they can be applied, and the nature of the inspection which should be insisted on (see Glen, *Public Health*, p. 149). Besides the regulations imposed by these by-laws the authority can require a proper water supply (s. 81); and the keeper must limewash the walls and ceilings twice a year, in April and October (s. 83), must give notice to the authority and the relieving officer of any case of fever or infectious disease (s. 84). This last provision is in addition to those of the by-laws and to sec. 32 of the Public Health Act, 1890, or the Infectious Diseases Notification Act, 1889, where they have been adopted. Officers of the local authority are entitled to free access at all times (s. 85), and if the keeper takes in beggars or vagrants he must, if required by the authority, report in a schedule to be furnished him a full list of all beggars and vagrants who lodged with him the preceding night (s. 83).

Penalties are imposed for breaches of the Act and regulations (s. 87), and on a third conviction the keeper of a common lodging-house is struck off the register. But apart from this provision there is no power to cancel registration (*Blake v. Kelly*, 1887, 52 J. P. 263).

London.—The County of London (except the City) is still under the Common Lodging-Houses Acts of 1851 and 1853 (14 & 15 Vict. c. 28; 16 & 17 Vict. c. 41), sometimes styled Lord Shaftesbury's Acts, which were repealed in 1875 as to the rest of England by sec. 343 of the Public Health Act, 1875. The provisions are in most respects similar to those in the country, and the similarity was rendered complete by the enactments (29 & 30 Vict. c. 90, s. 41) as to proof of the inmates being members of one family, and (37 & 38 Vict. c. 82, s. 49) as to notice of registration being affixed to the premises. The administration of the Acts was, from 1851 till 1894, in the hands of the Chief Commissioner of Police, and the right of free access was given to officers of police (1851, s. 12); and the regulations or by-laws were made by the Chief Commissioner with

the approval of the Local Government Board (14 & 15 Vict. c. 28, ss. 9, 10, as modified by 37 & 38 Vict. c. 89, s. 46). His powers until 1894 extended to the whole of the metropolitan police district.

In 1894 by a Provisional Order Confirmation Act (57 & 58 Vict. c. cccxiv.) the powers of the Chief Commissioner were transferred to the London County Council; but the police power of entry is preserved.

In the City of London and the metropolitan police district outside the County of London, the County Council has no authority. In the latter, the Acts seem still in force (see 38 & 39 Vict. c. 55, Sched. 5), but overlap the equally applicable provisions of the Public Health Acts, 1875 and 1890.

[*Authorities*.—See Lumley, *Public Health*, 5th ed., 104; Glen, *Public Health*, 6th ed., 148; Stevenson and Murphy, *Hygiene and Public Health*, vol. iii. pp. 71, 77, 329.]

Common Pleas, Court of.—See SUPREME COURT; DURHAM and LANCASTER.

Common Prayer, Book of.—See PRAYER-BOOK.

Common Recovery.—See FINES AND RECOVERIES.

Common Serjeant.—A judicial officer of the Corporation of the City of London. He was elected by the Court of Common Council (Pulling, *City of London*, 52) until 1888; but is now appointed by the Crown, and must be a duly qualified barrister (51 & 52 Vict. c. 41, s. 42 (14)). His functions are (1) to sit at the Central Criminal Court, of which he is *ex officio* a commissioner (4 & 5 Will. IV. c. 36, s. 1); (2) to sit as a judge of the Mayor's Court of London (20 & 21 Vict. c. clvii.); (3) to act as a law officer of the corporation, and particularly as legal adviser of the commoners of the city, and to act as counsel of the city in Court if called on; to attend the Courts of Aldermen and Common Council, and the committees of corporation to give advice, and to attend elections and common hall, and to attend the Lord Mayor on public occasions (Pulling, *City of London*, pp. 54, 120).

These functions are not affected by the Local Government Act, 1888 (51 & 52 Vict. c. 41, see s. 42 (13)).

He is not disqualified by his office from sitting in Parliament. The salary paid by the corporation to the present holder of the office is £3000 a year.

[*Authorities*.—See *Second Report of Municipal Corporation Commissioners*, p. 83; *London Unification Report* of 1894.]

Common to the Trade; Common Use.—See TRADE MARKS.

Commons.—See BAR; INNS OF COURT.

Commons, House of.—See HOUSE OF COMMONS.

Commote.—"A commote is a great seigniori, and may include one or divers manors" (Co. Lit. 5 a). The word was also at one time in use in Wales to denote a territorial division, believed to be the half of a cantref or hundred.

Communion (Holy).—In the present century the doctrine of the *Real Presence* and the historical facts connected therewith have been the subject of proceedings in the law Courts. In *Sheppard v. Bennett*, 1870, L. R. 3 Ad. & Ec. 167, Sir R. Phillimore, Official Principal of the Arches Court, considered that the objective and real presence, or the spiritual real presence, a presence external to the act of the communicant, appeared to be the doctrine which the formularies of the Church of England, duly considered and construed so as to be harmonious, intended to maintain, though he would not say that what is known as the receptionist doctrine was inadmissible, and consequently he held that it is not contrary to law for a minister of the Church to affirm or promulgate the doctrine that there is an actual real presence, external to the act of the communicant, in the elements consecrated in the administration of the Holy Communion. The case came twice before the Privy Council, 1870, L. R. 4 P. C. (1st appeal), p. 350; (2nd appeal), p. 371. In the first appeal, from an interlocutory judgment of Sir R. Phillimore, the Privy Council held that the doctrine of the real presence is not a doctrine in contravention of Article 29. On the second appeal from the judgment of the Arches Court, the Privy Council, while confirming Sir R. Phillimore's judgment, laid down that the Church of England in her formularies teaches that there is in the ordinance of the Lord's Supper a presence of Christ to the soul of the worthy recipient. As to the mode of reception, she affirms nothing except that the "Body of Christ is given, taken, and eaten in the Supper only after a heavenly and spiritual manner, and that the means whereby the Body of Christ is received and eaten in the Supper is faith." Any other presence than this the Church does not require her ministers to accept; and consequently the maintaining by a clergyman of a "real actual objective presence of our Lord upon the altar under the forms of bread and wine cannot properly be made the ground of a criminal charge against him." They further declared that a clergyman cannot be condemned for maintaining that the change of "corporal" for real and essential, in the declaration appended to the communion service, was an intentional substitution, implying that there may be a real and essential as distinguished from a corporal presence; but he must not allege the presence of the body of Christ in a corporal or natural manner. *Ex parte Denison*, 1857, 1 Jur. N. S. 517; *Ditcher v. Denison*, 1857, 11 Moo. P. C. 324, does not call for comment, the decision of the Archbishop of Canterbury having been overruled.

Sacramental Adoration.—Article 28 lays down that the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped. In *Martin v. Mackonochie*, 1868, L. R. 2 P. C. 365, it was held by the Privy Council that, according to the rubric, the celebrant during the prayer of consecration must stand and not kneel or prostrate himself before the consecrated elements. In *Sheppard v. Bennett* (*supra*) the Privy Council held that while the doctrine that adoration is due to the consecrated elements is contrary to law, the statement of the respondent that worship is due to the body and blood of Christ, supernaturally and invisibly present in the Lord's Supper, under the forms of bread and wine, in

the absence of any outward act of adoration, would not support any penal proceedings.

Altar.—The word altar is used in the Coronation Service and also in modern Acts of Parliament dealing with the building of new churches (59 Geo. III. c. 134, s. 6; 2 & 3 Will. IV. c. 61). In certain modern cases the Courts have attempted to draw a distinction between the communion table of the Church of England and the Roman Catholic altar. In *Faulkner v. Litchfield*, 1845, 1 Rob. C. p. 184, the Court of Arches held that an altar of solid stone intended to be immoveable was illegal, and this decision was approved in *Westerton v. Liddell*, 1857, Moore's Special Report. On these decisions Sir Walter Phillimore (*Ecc. Law*, i. 724) observes "that they will require careful reconsideration, having regard to the subsequent decisions of the Privy Council, authorising a ledge upon the holy table, and the subsequent decisions of the Privy Council and other Courts authorising reredosses of great splendour, whose only rationale is as an adjunct to a permanent holy table, and which would be equally appropriate to a Roman Catholic altar." A moveable ledge of wood for the purpose of holding candlesticks, vessels, etc., may lawfully be placed on the communion table (*Liddell v. Beale*, 1860, 14 Moo. P. C. at p. 14); a credence table, *i.e.* a small side table on which the bread and wine are placed before consecration, is also lawful. In *Faulkner v. Litchfield* and *Liddell v. Westerton*, in the Arches Court, they were pronounced illegal; but in the last-named case the Privy Council reversed the decision, and as a matter of fact they ought to be provided.

The rubric and the 82nd Canon apparently contemplate there being only one altar or communion table in a church; but it has recently been held that on the grounds of convenience a second altar or communion table may be placed in the side chapel of a church (*In re Holy Trinity Church, Stroud Green*, 1887, 12 P. C. 199; *In re St. Paul's, Wilton Place*, 1889; Tristram, *Consistory Judgments*). It is the duty of the churchwardens to provide a holy table (see CHURCHWARDEN).

Altar Cloths and Flowers on the Altar.—Canon 82 of 1603 requires that the holy table (altar) be covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place, if any question be made of it, and with a fair linen cloth at the time of the ministration.

In *Liddell v. Westerton*, 1857, Moore Special Report, pp. 186–188, objection was taken both to the use of divers coloured cloths embroidered and adorned and so used as to cover the holy table with five different coverings at different seasons of the year, and to the use of embroidered linen and lace instead of a simple "fair white linen cloth" at the administration of the Holy Communion. Both objections were sustained by the judges of the Consistory of London and of the Court of Arches. The Privy Council, however, reversed the sentence so far as the coloured coverings were concerned, while affirming the part of the decree which forbade the use of embroidered linen and lace. It would appear that the altar may not be left bare even on Good Friday (*Liddell v. Westerton*, *supra*).

It is lawful to place vases of flowers on the communion table, and to keep them there during service if they are used for purposes of decoration only (*Elphinstone v. Purchas*, 1870, L. R. 3 Ad. & Ec. p. 66).

Celebration of the Holy Communion.—As to the service generally: in the Book of Common Prayer, the rubric provides that "the bread and wine shall be provided by the curate and churchwardens at the cost of the parish. Canon 2 of 1603 directs that the churchwardens shall provide a sufficient quantity of fine wheat bread, and a sufficient quantity of good and whole-

some wine, for the number of communicants that shall receive there, which wine shall be brought to the communion table in a clean and sweet standing pot or stoop of pewter if not of pure metal."

It is also their duty to provide a chalice or communion cup and one or more flagons. In *Ridsdale v. Clifton*, 1877, L. R. 2 P. D. 276, where the charge was "that the appellant used in the communion service and administration wafer bread or wafers, to wit, bread or flour made in the form of circular wafers, instead of bread such as is usual to be eaten," the Privy Council held that if the wafer, properly so called, had been used it would have been illegal; but that the appellant had not acted illegally in using bread in a circular shape, and which was so thin that it might be termed a wafer.

The rubrics provide "there shall be no celebration of the Lord's Supper except there be a convenient number to communicate with the priest, according to his discretion." "And if there be not above twenty persons in the parish of discretion to receive the communion, yet there shall be no communion except four (or three at the least) communicate with the priest." It has been held illegal for a clergyman at public service to receive the elements alone or when only one or two persons communicated with him, although a large number of persons were present who might possibly have received (*Clifton v. Ridsdale*, 1876, L. R. 1 P. D. 316).

It was held by the Privy Council in *Martin v. Mackonochie*, 1868, L. R. 2 P. C. 365, that during the prayer of consecration the celebrant must stand and not kneel or prostrate himself before the consecrated elements during the reciting of the prayer, and in *Martin v. Mackonochie*, 1869, L. R. 3 P. C., the same tribunal held that for the celebrant to bow the knee so low that it is impossible for anyone to say whether he is kneeling or not, is also an infringement of the rubric.

In *Martin v. Mackonochie*, 1868, L. R. 2 Ad. & Ec. 116, it was held illegal for a clerk in holy orders to elevate the paten and cup above his head after consecration, and in *Martin v. Mackonochie*, 1869, L. R. 2 P. C. 62, the Privy Council expressed the opinion (though the point was not raised) that they gave no sanction whatever to a notion that any elevation of the elements, as distinguished from the act of removing them from the table, has the sanction of law.

It has been held by Sir R. Phillimore, Official Principal of the Court of Arches, that although the burning of incense may be in itself an ancient, innocent, and pleasing custom, yet to bring in incense at the beginning or during the celebration, and remove it at the close of the Eucharist, is an unlawful ceremony (*Martin v. Mackonochie*, first suit, *supra*); that the ceremonial use of incense immediately before the celebration of the Holy Communion, so as to be preparatory or subsidiary to the celebration of the same, is also unlawful (*Sumner v. Wix*, 1870, L. R. 3 Ad. & Ec. 58).

The rubric provides that the minister should, before the prayer of consecration, break the bread before the people. The Archbishop of Canterbury (Dr. Benson), in *Read v. Bishop of Lincoln*, [1891] Prob. 9, held that the manual acts to which this rubric refers must be so performed as to be visible to the communicants.

It has been held in *Martin v. Mackonochie*, 1868 (*supra*), *Dean v. Green*, 1882, L. R. 8 P. D. 79, that the mixing of wine with the water as part of the service is illegal (and see also *Read v. Bishop of Lincoln*, *supra*), but it is not an offence to make use of a cup containing water and wine mixed beforehand (*Read v. Bishop of Lincoln*, *supra*, and on appeal, [1892] App. Cas. 664).

At the communion service it is unlawful for the celebrant to make the sign of the cross during the absolution, nor must such sign be made at the benediction, for such an act constitutes an illegal addition to the service, and has no warrant in the practice of the Church of England, either before or after the Reformation. See *Read v. Bishop of Lincoln*, *supra*.

As to the singing of the hymn "Agnus Dei," after the prayer of consecration, see AGNUS DEI. As to vestments, see VESTMENTS; ADVERTISEMENTS OF QUEEN ELIZABETH. As to lights and candlesticks on the altar or communion table, see LIGHTS. As to the position of the celebrant, see EASTWARD POSITION. As to ABLUTIONS, see [1891] Prob. 30.

On the above decisions by the Privy Council it may be observed that (cp. *Read v. Bishop of Lincoln* (*supra*)) they may be open to reconsideration in the light of fresh historical information.

For the law as to communicants, see PARISHIONER.

[*Authorities*.—Lindwood, *Prov.*; Gibs. *Cod.*; Ayliffe, *Par.*; Phillimore, *Ecclesiastical Law*, 2nd ed.; the authorities referred to in *Read v. Bishop of Lincoln*; Prideaux, *Churchwarden's Guide*, 16th ed.]

Community of Property (French law) exists between husband and wife where no written ante-nuptial settlement has been entered into between them. Articles 1401 *et seq.* of the Civil Code fix minutely the rules applicable to this *régime*. The community under art. 1401 is composed of the following:—

1. Of all personalty which the husband and wife are possessed of at the time of the celebration of the marriage, together with all the "personalty which comes to them during the marriage, either by way of succession or even donation, unless the donor has provided to the contrary.

2. Of all profits, revenues, and interests of whatever nature they may be which have become due or have been received during the marriage, and derived from the property belonging to the husband and wife at the time of the celebration of the marriage or from the property which has accrued to them during the marriage in whatever way it may be.

3. Of all realty acquired during the marriage.

Companies, Chartered.

FORMER COMPANIES.

Chartered companies in past times played a great part in the development of foreign trade and imperial expansion, and have of late years been incorporated for similar purposes but under largely altered conditions. Though such companies raise political and economic questions of great interest, considerations of space and of the character of this work necessitate that they should be dealt with in these pages exclusively in their legal and constitutional aspects. The origin of chartered companies is to be found in the mediæval conditions which made it difficult, if not impossible, for the merchants of one country to carry on trade in another, without some organisation of their own, recognised alike by their own government and the rulers of the country where the trade was carried on. In Tudor times the necessity for such organisations to open out and maintain new fields of trade with distant countries, where the Crown could afford little or no protection, made itself even more strongly felt; and in the same period it was realised that by means of these companies private enterprise might be utilised to enlarge the dominions

of the Crown by planting and settling British colonies in the unoccupied regions of the American continent. The earliest of the chartered companies grew out of our commercial relations with the Low Countries. As the German merchants of the Hanse obtained a privileged position in this country under the protection of the Crown, so English traders in the Low Countries as early as the thirteenth century obtained a grant of privileges from the Duke of Brabant, including civil and criminal jurisdiction over the members of their own body, "mutilation of limb and life" only excepted. These privileges were lost when the English Ordinance of the Staple in 1353 forbade English merchants themselves to trade beyond the seas in the staple commodities (the chief of which was English wool), and by fixing the staple or mart of such commodities in England, threw the English export trade into the hands of foreign merchants. But this system was not rigorously maintained during the short time it lasted. The Staple Roll of 1359 (cited in Cunningham, vol. i. p. 619) records that the king had granted to certain English merchants a licence to export staple commodities for a time, and had procured from the Count of Flanders, and at the special request of the good people of Bruges, the restoration of former privileges under a governor of their own choice. The beginnings of the chartered company of the *Merchant Adventurers of England*, whose first field of operations was in the Low Countries, may here be traced. Soon afterwards the English staple was transferred to Calais, and placed in the hands of the Mayor and Company of the Staplers of England, who received a charter from Richard II. In 1391 the same monarch made a grant to the English merchants trading in Prussia, empowering them to elect a governor to administer swift and speedy justice among them, and to make reasonable ordinances for their own government, according to the powers and authorities conferred upon them by the Master of Prussia (Rymer, vol. vii. p. 693). This was the origin of the later *Eastland Company*, whose field of operations was Prussia and the Baltic. In 1430 the English traders in the Low Countries obtained from the Crown a prohibition to other English subjects to buy and sell there (Rymer, vol. x. p. 471), and this would appear to be the introduction of the principle of trade monopoly, which was a leading feature of the later chartered companies. Hakluyt (vol. i. p. 208) prints a charter of Edward IV. appointing one William Olray, governor, judge, and warden of justice, over the English merchants trading in the Low Countries. He was to be assisted by twelve justicers chosen by the merchants. The monopoly of the organisation was mitigated in 1497 by the statute of 12 Hen. VII. c. 6, which fixed the fine payable for admission to the trade at ten marks. In 1505 Henry VII. by a grant (printed in Cawston and Keane, p. 249) fixed the seat of government of these merchants at Calais, and conferred upon them the title of the *Fellowship of Merchant Adventurers*. Their chief business was the export of English cloth, and they came into frequent collision with the Staple Company, who were also fixed at Calais and controlled the declining export of wool, and also with the powerful organisation of the Hanse. From Calais the Merchant Adventurers removed their chief seat of government to Antwerp, where they flourished exceedingly until they were expelled by Alva. In 1564 Elizabeth granted them a charter of incorporation under the title of the Governor, Assistants, and Fellowship of the Merchant Adventurers of England, and at the same time removed doubts as to their power to trade beyond the Low Countries, in East Friesland, Lubeck, and Hamburg. (This charter is printed in Cawston and Keane, p. 254, but the text is difficult, and possibly corrupt in some places.) By the constitution of the company, as settled in this charter, the principal seat of government

of the company, their counter, as it was called, was fixed in some town abroad, finally at Hamburg, whence they became known as the Hamburg Company. The merchants of the company residing abroad were to assemble and choose a governor and twenty-four assistants for the government of the members of the company, and also of other English subjects in those parts, and to act under powers and authorities derived from the local rulers. The authority of the company was also exercised in other towns abroad within their district. The company was also empowered by the charter to meet in general court in England, and to make ordinances, and to summon before it the members of the company, and enforce obedience by fine and imprisonment. Lastly, power was reserved to revoke the charter, but without prejudice to previous grants. The Merchant Adventurers Company was the type of the regulated trading companies, to which individual merchants were admitted on certain conditions, and then traded each on his own account. Such companies are to be distinguished from joint-stock companies such as the East India Company and the Hudson's Bay Company, where the trade was carried on by the company itself with a subscribed stock. The trading monopolies of regulated companies, to which admission was easy, were less oppressive, and involved less interference with freedom of trade than those enjoyed by joint-stock companies, but did not escape being called in question (see below). The control exercised by the Merchant Adventurers or Hamburg Company passed gradually away in favour of unrestricted freedom of trade, but some of the duties they discharged are now fulfilled by consuls.

Some of the other regulated trading companies must be very briefly dealt with. In 1531 Henry VIII. empowered English traders in Andalusia and Spain to elect a governor-consul in Spain and twelve assistants, and the authority of the governor and assistants over English traders in Spain was confirmed by a grant of the Emperor Charles V. in 1538 (*Brit. Mus. Hist. MSS.*). In 1579 a company was incorporated under the title of the *Fellowship of the Eastland Merchants*, and they were given the monopoly of the trade through the Sound to Prussia and the Baltic. This monopoly was abolished in 1672 by statute, 25 Cha. II. c. 7, chiefly on the ground that it had thrown the Baltic trade into the hands of the Dutch. Of greater historical interest was the *Russia or Muscovy Company*, which received a charter from Philip and Mary in 1555 in consequence of Chancellor's successful voyage to Archangel on the White Sea. The charter (printed in Hakluyt, vol. i. p. 267) incorporated the company "for the discovery of lands, territories, isles, dominions, and seignories unknown, and not before the late adventure by sea or navigation commonly frequented." Discovery and colonisation as well as the regulation of trade were among the objects for which this company was incorporated, but no such results followed in this instance. Its monopoly was confirmed by Act of Parliament in 1566 (see Hakluyt, vol. i. p. 369). Under the charter, the government of the company in Russia was placed in the hands of a governor, four consuls, and twenty-eight assistants. Various grants from the Czars conferred upon the members of the company a highly privileged position in Russia as compared with the traders of other nationalities, but these privileges were forfeited by the Czar on hearing of the execution of Charles I. in 1649, and the company never afterwards recovered its pre-eminent position. It continued, however, in existence, and at the beginning of the century Pitt made use of its agency to finance the Czar in the Napoleonic war. Until recently, it levied a small duty on Russian exports to England, out of which it paid the consuls in Russia and kept up the chapels at

Moscow and St. Petersburg, but it has now ceased to discharge these duties, and is only kept alive by the possession of invested funds (*Early Voyages to Russia*, Hakluyt Society, vol. i. p. lvii, Introduction).

The origin of the *Levant* or *Turkey Company* is to be found in a grant made by Elizabeth in 1581 (printed in Hakluyt, vol. ii. p. 146) to certain individuals in recognition of their "opening out a new trade into the dominions of the Grand Signior not previously known or frequented by any of our subjects," conferring upon them a monopoly of such trade for a certain number of years "by virtue of our high prerogative royal, which we will not have argued or brought in question." The *Levant* or *Turkey Company* was permanently incorporated by James I. in 1605. The charter (*Brit. Mus. Hist. MSS.*) provided that the company in general court should choose consuls and vice-consuls in all places in the *Levant Seas*, and that such consuls should have power to govern the merchant subjects of this realm, their factors and servants, and to administer speedy justice in all complaints and contentions arising between them, and to do and execute all things prescribed by the general court. The general court of the company was empowered to make laws and orders for the members of the company, enforceable by fine or imprisonment, not contrary to the laws of this realm, or to any capitulation with a foreign prince. On the ground that those inexperienced in the course of merchandise commit many absurdities, a monopoly of the *Levant* trade was granted to the company. Rymer, vol. xvi. p. 659, prints under the following year, 1606, a commission appointing Thomas Glover ambassador at Constantinople, and empowering him to take into his own hands the privileges granted by the *Porte* to English subjects, and giving him authority to fix the ports where they might trade and prohibit others, and to appoint consuls in such trading ports, make regulations, and do all things pertaining to the due government of English subjects and the exercise of commerce therein. The inconsistencies between the charter and this commission may be explained by the desire to represent the consuls to the *Porte* as appointed under the direct authority of the Crown. The system of capitulations or grants allowing foreign nationalities in Turkey to live under their own laws was inherited by the Sultans from the Byzantine Emperors, and is still the basis of the foreign jurisdiction exercised in Turkey under the Foreign Jurisdiction Act. An ordinance of the Long Parliament, in 1643, recognised the right of the company to nominate the ambassador at Constantinople as well as the consuls. After the Restoration Charles II. granted the company a further charter (original in the Record Office). It provided, among other things, that if any English subjects should scandalously refuse the jurisdiction of the ambassador, resident, or agent, or of the consuls or vice-consuls appointed by the company, they should be arrested and sent over in custody to this country in order that they might receive their justice here by the laws of this realm according to their several cases and demerits. In 1753, the constitution and exclusive privileges of the company were confirmed by 26 Geo. II. c. 13, which gave an appeal from the by-laws of the company to the Lords of Trade. The company nominated and paid the ambassador at Constantinople until 1803, and the consuls in the Sultan's dominions until 1825. In the latter year the charter was surrendered pursuant to 6 Geo. IV. c. 33, the Government at the same time taking over the maintenance of the consular establishments. It was provided (s. 4) that all rights and duties of jurisdiction and authority over British subjects resorting to the ports of the *Levant* for trade or otherwise, which were lawfully exercised and performed, or which the company's

charters and Acts authorised to be exercised and performed by their consuls, or which such consuls exercised and performed under any power or authority whatever, should be exercised by the consuls appointed by the Crown. The jurisdiction originally conferred by the charters had in course of time been extended by usage so as to embrace crimes committed by British subjects, mixed suits where the defendant was a British subject, and persons not technically British subjects, but under British protection (see *The Laconia*, 1837, 2 Moo. P. C. N. S. 161). In 1836 it was thought desirable to place the jurisdiction on a statutory basis by the first of the Foreign Jurisdiction Acts (6 & 7 Will. IV. c. 78). See FOREIGN JURISDICTION.

The first effective employment of the chartered company for colonising purposes dates from the early years of the seventeenth century. In 1609 James I. incorporated a chartered company under the title of the *Treasurer and Company of Adventurers and Planters of the City of London for the First Colony of Virginia*, to effect the colonisation of Virginia, which had already been granted in 1606, by letters patent, to some of the persons here incorporated. The company were to find the money for planting the new colony as their estate, and were to be recouped by the profits of cultivation, and the mineral wealth, of which extravagant but unfounded hopes were current. The constitutional provisions of the charter were as follows: The company in their general courts were to elect a treasurer and council, who were to superintend the new colony from London, to establish a form of government there, and to make laws for it as near as conveniently might be to the laws of England. In 1612 a new patent enlarged the bounds of the colony, and transferred the power of legislating from the council to the company assembled in general court. The Virginia Company was not long-lived; misfortunes fell upon it, and its charter was vacated by *quo warranto* in 1624; but the first British colony was settled under its direction, and received a constitution consisting of a governor, a nominated council, and an elective general assembly. The laws passed in the colony required the approval of the company at home, and it was afterwards provided that the ordinances of the company should not be binding in the colony until ratified by the local legislature. After the abolition of the charter the constitution of governor, council, and general assembly continued under the immediate government of the Crown, and formed the normal type of colonial constitution. The *Bermuda Company* was an offshoot of the Virginia Company, and obtained a charter with similar provisions. It made an oppressive use of its powers, governing the Bermudas and controlling their trade, rather with a view to its own interests than to those of the colonists. Its charter was in consequence vacated in the reign of Charles II.

The New England colony of Massachusetts was also founded by a chartered company incorporated March 4, 1629, under the title of *The Governor and Company of Massachusetts Bay in New England*, with a constitution resembling that of the Virginia Company. The governor and eighteen assistants were to be chosen by the freemen of the company; and the freemen in general court were to make laws for the government of the company and of the new plantation. Instead, however, of preserving the constitution of a chartered company, the grantees removed the charter itself to New England, and treated it as a written constitution granted by the Crown to the colony. The colonists were admitted as freemen of the company, and chose the governor and the assistants who formed his council; instead, however, of appearing in person in the general courts, the freemen elected deputies, who constituted a House of Deputies. This constitution, which

made the colony practically independent, continued until the charter was vacated in the reign of Charles II. After the Revolution, William III. granted a new charter reserving some measure of imperial control. The charters granted by Charles II. to Connecticut and Rhode Island were rather written constitutions on the Massachusetts model granted to the colonists already settled in these districts.

The Virginia Company, the Bermuda Company, and the Massachusetts Company in its inception were companies with internal constitutions resembling those of the old trading companies, but incorporated for the express purpose of founding new colonies. *The East India Company*, chartered December 31, 1600, on the other hand, was a purely trading company, with a monopoly of the East India trade for fifteen years, and powers of internal government resembling those granted to the old trading companies. It differed from them, however, in this, that after 1612 the company traded on the joint-stock principle, that is to say, there was one general stock for the company, instead of each member being left to trade on his own account. It was only by slow degrees that, by the joint effect of charters from the British Crown and treaties with the native rulers of India, it became a sovereign body under the British Crown. The charter of 1661 empowered the company to appoint governors and councils in their forts and factories, with civil and criminal jurisdiction, and to make peace and war with non-Christian princes, and to erect forts and castles. In 1669 Charles II. granted them the island of Bombay in free and common socage, with power to make laws and ordinances, administer justice, etc., and with like powers over the possessions which they might afterwards purchase or lawfully acquire. In 1683 they were empowered to seize and condemn all interloping ships, to rule and govern their forts and plantations, to make peace and war, raise military forces, commission ships, and exercise martial law, expressly reserving to the Crown "the sovereign rights, powers, and dominion over all the said forts and plantations, to be at any time settled in the parts aforesaid, and the power of making peace and war when we shall interpose our sovereign authority" (*Charter relating to the East India Company from 1600 to 1761*, ed. Shaw, Madras, 1887). The subsequent history of the East India Company has already been dealt with under BRITISH INDIA (*q.v.*), but two constitutional questions affecting chartered companies generally must here be referred to. The first relates to the monopolies of foreign trade granted by the Crown to chartered companies. The statute against monopolies of 21 Jas. I. c. 3, s. 9, expressly excepted from its provisions "companies or societies of merchants within this realm erected for the maintenance, enlargement, or ordering of any trade of merchandise." In the case of the *East India Company v. Sandys*, 10 St. Tri. 371, and 2 Show. 366, Jeffreys decided in favour of the monopoly, but against the forfeiture clauses in the company's charter (see also *Merchant Adventurers v. Rebow*, 3 Mod. 131). In spite of this decision, the company's monopoly continued to be attacked after the Revolution, and in 1693 the House of Commons resolved without a division that "all subjects of England have an equal right to trade to the East Indies, unless prohibited by Act of Parliament" (*Com. Journ.*, Jan. 19, 1693-94, vol. x. p. 783). This resolution, though not amounting to a legal decision, may be said to have practically decided the long-controverted question of these monopolies of foreign trade. Anderson, whose statement has been frequently repeated, erroneously states that these monopolies were overthrown by the Bill of Rights, but that measure contains no allusion to

the subject. Another constitutional question arose in regard to the territorial acquisitions made by the company in India. In 1773, when there was a question of not renewing the company's charter, the House of Commons resolved that "all acquisitions made under the influence of a military force, or by treaty with foreign princes, do of right belong to the State" (*Com. Journ.*, May 10, 1773, vol. xxxiv. p. 308). The principle that such acquisitions are at the disposal of Parliament was subsequently acted on in the various Acts by which Parliament first regulated and then took over the government of India.

Of the ancient African chartered companies the most important was the *Royal Africa Company*, chartered in 1672. The charter empowered the company to govern their forts and factories, etc., and to make peace and war, reserving only the sovereign rights of the Crown over the plantations, and the power of making peace and war. They were granted a monopoly of the African trade, including the supply of negro slaves to the English plantations in America and the West Indies, with the corresponding duty of keeping up the necessary forts and stations on the African mainland. In 1698 the company was regulated by Act of Parliament, and the trade thrown open to all who complied with certain conditions. In 1750-52, by virtue of 23 Geo. II. c. 31 and 25 Geo. II. c. 40, the *Royal Africa Company*, which had become embarrassed, was abolished, and the forts and settlements until then in its possession were vested in the *Company of Merchants trading to Africa*, which was a regulated company open to all traders. They were to elect a committee of nine, who were to appoint governors, make regulations, and, with the consent of the Lords of Trade, to raise military forces, to erect courts, and inflict punishments short of life and limb, reserving always the right of the Crown to revoke the regulations and make others. The company itself was forbidden to embark in trade. In 1765, 5 Geo. III. c. 44 took away some of these forts and settlements and vested them in the Crown, but in 1783 they were transferred to the company by 23 Geo. III. c. 65. Another African company came into existence in 1791, when a number of philanthropists were incorporated by Act of Parliament under the title of the *Sierra Leone Company*, for the purpose of establishing a settlement on the African coast for the benefit of liberated slaves and the development of legitimate trade. A charter of justice was granted in 1800 empowering the company to appoint a governor and council, and to legislate for the colony; but the experiment was not successful, and in 1808 an Act of Parliament was passed vesting the colony in the Crown. A similar fate befell the *Africa Company* itself in 1821, when it was dissolved by 1 & 2 Geo. IV. c. 28, and its possessions vested in the Crown, and some of them annexed to Sierra Leone.

A word must be said about the *South Sea Company*, which was incorporated pursuant to Act of Parliament in 1711, with a monopoly of the trade to the South Seas, and afterwards acquired the right of supplying the Spanish dominions in South America with slaves, under the *Assiento* clauses of the Treaty of Utrecht. This is not the place to tell the story of the South Sea Bubble, when it was attempted to pay off the National Debt by converting it into South Sea stock. The *Assiento* treaty was determined in 1750, and the exclusive privileges of the *South Sea Company* were abolished, subject to compensation, by 55 Geo. III. c. 57. The company, which was largely engaged in the whale fishery, appears to have continued in existence down to 1856.

The only one of the old chartered companies which still actively survives is the *Hudson's Bay Company*, which was incorporated by Royal

Charter in 1670, under the style of "The Governor and Company of Adventurers of England trading into Hudson's Bay." The company were granted the exclusive trade and commerce within all the seas, straits, lands, etc., adjoining Hudson's Bay not occupied by the king's subjects, or by the subjects of any Christian prince or State. They were constituted lords proprietors of these territories, and empowered to hold general courts, in which members were to vote according to their stock, and to make laws and ordinances agreeable to the laws of England for the government of their forts and plantations, and to appoint local governors and councils with civil and criminal jurisdiction, and the power of making peace and war with non-Christians, and excluding and arresting trespassers in the company's territories. The company used the vast territories they acquired under this charter as a preserve for their fur trade. At the close of the last century their exclusive privileges were threatened by the North-West Company, a free association of traders. These differences were composed and the two companies amalgamated by 1 & 2 Geo. IV. c. 66. In 1857 the law officers advised that the company's charter could not legally confer a monopoly of trade, save in so far as territorial ownership justified the exclusion of intruders, nor could it confer an exclusive right to administer justice so as to oust the prerogative of the Crown to establish courts of civil and criminal jurisdiction (Forsyth, *Cases and Opinions*, p. 434). In 1868 the company surrendered its sovereign rights under the charter, and its territories were incorporated in the Dominion of Canada pursuant to 31 & 32 Vict. c. 105, and afterwards became known as the provinces of Manitoba, etc. The company, however, still continues to exist as a great landowning and trading corporation.

Before coming to the recent chartered companies mention must be made of the *New Zealand Company*, which was incorporated by Royal Charter of 13th February 1841, for the purpose of colonising with British settlers large tracts in New Zealand which the grantees had acquired from the native chiefs. No sovereign rights were conferred upon the company, the government of the colony being carried on under the authority of the Crown and Parliament. The history of this company may be read in 9 & 10 Vict. c. 42 and 10 & 11 Vict. c. 112, under which £236,000 was advanced to them out of the Consolidated Fund. It was provided that they might surrender their charter if they found themselves unable to continue their undertaking with profit to themselves and benefit to the colony, and that then the loan was to be remitted. This option they exercised in 1850, and in 1857 a grant was made to the shareholders (20 & 21 Vict. c. 52) in settlement of all claims. Earl Grey in 1852 stated that the colonisation of New Zealand was largely due to the work of the company, but that the necessary expenses of founding new colonies in distant parts of the world were so great that measures of the kind would never answer as a pecuniary speculation.

RECENT CHARTERED COMPANIES.

The foregoing sketch shows how extensive were the powers which the Crown in the exercise of the prerogative conferred upon chartered companies for the government of its colonial possessions, as in the case of the Virginia, Massachusetts, and Hudson's Bay Companies, or for the regulation of trade and governing of English subjects in foreign countries, as in the cases of the Merchant Adventurers, the Russia, and the Levant Companies. With regard to British possessions acquired by conquest or cession, the power of the Crown to exercise or delegate such powers has never been doubted; while as to possessions acquired by settlement all doubt has

been set at rest by the British Settlements Act, 1887. In territories not annexed to and incorporated in the Queen's dominions the Crown may exercise power and jurisdiction acquired by treaty, grant, usage, sufferance, or other lawful means; for this there is new statutory authority in the Foreign Jurisdiction Act, 1890. It should, however, be observed that in the recent creation of chartered companies the Crown makes no grant of any such powers, but has confined itself to recognising or authorising the acquisition by the company of territory, power, and jurisdiction in places beyond the Queen's dominions from the native authorities, coupling this recognition and authority with conditions as to the way in which the powers so acquired should be exercised. Such restrictions are the price paid by the company for the recognition of the State, without which private individuals or companies would be unable to acquire rights of sovereignty or jurisdiction permanently binding on the native rulers of the territories in which their operations are carried on; or valid against other civilised powers, since international law does not reckon with individuals but with States; or safely enforceable against the subjects of this or other countries; as to this latter point, see *Rafael v. Verelst*, 1775, 2 Black. W. 1055, and the cases cited by Wright, J., in *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. at p. 374, where some of the legal consequences attendant on the grant of a charter are described as follows in a passage afterwards approved in the House of Lords: "If the defendants, the British South Africa Company, are authorised by their charter to make treaties of a political character with native chiefs and to acquire sovereign rights with the territories of these chiefs and if the defendants have made such treaties and acquired such rights, and if the defendants have done the acts complained of in their own character as a sovereign power under such a charter and treaties, then their own acts may have been of the character of the acts of State (see ACT OF STATE) and not examinable in any municipal court, according to the principles recognised by Lord Thurlow and Eyre, C.B., in the case of *Nabob of Arcot v. East India Co.* (1791, 3 Br. Ch. Ca. 292; 4 Br. Ch. Ca. 180; 2 Ves. Jun. 56). If that were made out by the defendants, the plaintiffs would not be without remedy, but the remedy would be, not legal, but diplomatic, and redress might be sought by Portugal on behalf of the plaintiffs from the Crown of England."

The constitutional relations between the Crown and the companies as regards the territorial and sovereign rights acquired by the latter from the native rulers are governed by the terms of the charters or other agreements made between the Crown and the companies. It is indeed a general principle that sovereign rights acquired by the subject enure for the benefit of the State (see the case of the East India Company, above), but this must be subject to the condition that the State chooses to take advantage of them. No subject, whether a private individual or a company, can by acquiring all the sovereign rights in a particular territory thereby necessarily commit the Crown to the assumption of sovereignty over such territory so as to annex it to and incorporate it in the Queen's dominions, with all the important legal and other consequences attaching to such a step. In *R. v. Jameson*, 1896, 12 T. L. R. 584, where, however, the point was of little or no importance, and very slightly argued, Lord Russell, L.C.J., appears to have laid down that in a Protectorate administered under the direct authority of the Crown, the exercise of sovereign rights by the Crown might be so complete as to amount to annexation to the Queen's dominions without any express declaration to that effect. But in the case of the territories administered by chartered companies, the very

terms of the charters authorising the company to acquire and hold sovereign rights from the native rulers negative the idea of annexation which would involve an extinction of such rights.

That this was the view on which the Crown was advised to proceed in regard to recent chartered companies appears from the correspondence with Spain and the Netherlands in 1882 respecting the charter granted to the *North Borneo Company*, November 1, 1881 (State Papers, vol. lxxiii. p. 932, etc.). This was the first of the recent charters, and was granted on the petition of certain persons reciting that they had obtained from the Sultans of Brunei and Sulu a grant of territory and sovereign rights, subject only to a right of resumption on non-payment of the stipulated tribute. The charter granted by the Crown incorporated the company, and authorised and empowered it to acquire the full benefit of the aforesaid concessions, and to hold, use, enjoy, and exercise the same for the purposes and on the terms of the charter. Lord Granville, in a despatch to Sir Robert Morier, 7th January 1882, stated that there was no question of the annexation of North Borneo to Great Britain or of the establishment of a Protectorate there. The company, he explained, was established under three charters. "The first two charters are those under which the company derive their title to the possession of the territories in question, and the authority to administer the government of these countries by delegation from the Sultans. The third is the British charter, under which the company have obtained incorporation and a recognition by Her Majesty's Government of their title to the territories so granted. In return for incorporation by Royal Charter, and for the recognition of the concessions, the company have surrendered to Her Majesty various powers of control over their proceedings, which, though of a negative character only, are sufficient for the prevention of any abuse in the exercise of the authority conferred by the Sultans. It is important to bear in mind that no such control would have been reserved to the Crown had the company taken incorporation under the Companies Acts, and elected to follow their own course independently of Government support. The Borneo charter therefore differs essentially from the previous charters granted by the Crown to the East India Company, the Hudson's Bay Company, the New Zealand Company, and other associations of that character, in the fact that the Crown in the present case assumes no dominion or sovereignty over the territories occupied by the company, nor does it purport to grant to the company any powers of government thereover; it merely confers upon the persons associated the status and incidents of a body corporate, and recognises the grants of territory and the powers of government made and delegated by the Sultans in whom the sovereignty remains vested. It differs also from previous charters in that it prohibits, instead of granting, a general monopoly of trade."

A recognised protectorate has since been established over the North Borneo Company's territories by an agreement of 12th May 1888 (Hertslet, *Treaties*, vol. xviii. p. 225), which, after reciting that all rights of sovereignty over the territories in question were vested in the North Borneo Company—a departure from the position taken up in Lord Granville's despatch—provided that the State of North Borneo should continue to be governed as an independent State in conformity with the provisions of the charter under the protection of Great Britain, but that its foreign relations should be conducted by Her Majesty's Government or in accordance with its directions.

The charter (Hertslet, *Treaties*, vol. xvii. p. 118) granted 10th July 1886, to the National African Company Limited, now known as the *Royal Niger Company Chartered and Limited*, differs from the Borneo charter in two

respects. In the first place, the company's field of operations was from the outset designed to be within the limits of the Empire, as the territories in question already constituted a British Protectorate (Hertslet, *Treaties*, vol. xvii. pp. 108, 126); secondly, the charter did not bestow incorporation on the company, which was already incorporated under the Companies Acts as a private trading company, but merely authorised and empowered the company to hold and retain the full benefit of the several cessions it had acquired from the native rulers in its territories.

The *Imperial British East Africa Company* received a similar charter in 1889 (State Papers, vol. lxxix. p. 641), empowering it to act under various cessions from the Sultan of Zanzibar, who was under British protection, and from the native rulers of the hinterland which lay within the British sphere of influence, as defined by the Berlin Act of 1884. This experiment of government by chartered company was not successful, and the company's territories were transferred to Her Majesty's Government, and are now administered as a protectorate under the Foreign Office.

The South Africa charter of 29th October 1889 (Hertslet, *Treaties*, vol. xviii. p. 134; *Map of Africa by Treaty*, vol. i. p. 174), incorporated a company under the name of the *British South Africa Company*, and, as in the previous charters, authorised such company to hold, use, and retain for the purposes of the company the full benefit of the concessions of territory and jurisdiction already acquired and to be thereafter acquired, with the sanction of the Secretary of State, within the field of its operations. As in the case of the Niger and East African Companies, the great part of such territories was already a British Protectorate.

The territories of the South Africa Company cover about 750,000 square miles, the territories of the Niger Company about 500,000 square miles, and the East Africa Company, before surrendering its charter, had extended British influence to Uganda and the sources of the Nile.

A brief description of the conditions on which the charters have been granted will best illustrate the existing system of government by chartered company in its constitutional relations. The British character of the companies is indicated by allowing them to use a British flag with a distinctive mark, and by requiring that the domicile and seat of government of the company should be British, and that the directors should be British subjects, and by further requiring them to submit to the control of the Secretary of State in their relations with foreign States, and to observe the treaties made with such States, and by forbidding them to alienate their concessions without consent of the Secretary of State. Provisions are inserted in all the charters against the establishment of trade monopolies, and in favour of freedom of trade; to secure the suppression of the slave trade, and the gradual abolition of domestic slavery; to secure due regard for the religion, laws, and land rights of the native inhabitants of the company's territories, and the due observance of the agreements made with them. Measures of the company affecting these matters are made subject to disallowance by the Secretary of State, who is generally empowered to object to any part of the proceedings or systems of the company affecting the native inhabitants, and to require them to act in accordance with his suggestions. The Niger and South Africa Companies are likewise required to submit annual accounts of their public revenue and expenditure, as distinct from their trading operations.

In all the charters the Crown has reserved the power to exercise its foreign jurisdiction in the company's territories, but so far this has only

been done in the case of the British South Africa Company. By Orders in Council under the Foreign Jurisdiction Act of 9th May 1891 and 18th July 1894 (Hertslet, *Treaties*, vol. xix. p. 67), the Imperial Government takes an active part in the administration of this company's territories. The Administrator is appointed with the approval of the Secretary of State, may be dismissed by him, and cannot be dismissed without his consent. The judges are appointed subject to his consent, and he alone can dismiss them. These Orders further empowered the High Commissioner in South Africa to legislate by proclamation. As the charter enables the company to make ordinances with the assent of the Secretary of State, and the Order of 1894 authorises the administrator and his council to make regulations which require the approval of the High Commissioner, but may be disallowed by the company, there are thus four methods of legislating for the company's territories. The ordinances of the company, and the regulations of the administrator and council are only binding in so far as they do not conflict with the provisions of the Orders in Council or the High Commissioner's proclamations. Under the Order of 1894 justice is administered by a High Court according to the Roman Dutch law in force in Cape Colony, except in so far as it has been modified, and with due regard to native law and custom in civil cases between natives. The Niger Company, on the other hand, has erected Courts under the authority of its charter which administer English law so far as applicable between non-natives of its territories, and apply to the natives a more loosely-defined system suitable to their circumstances.

The Borneo and South Africa charters also contain articles defining the general powers for which the company is incorporated, and requiring them to submit a deed of settlement regulating the internal constitution of the company for the approval of the Secretary of State.

In all the charters power is reserved to the Crown, without prejudice to its right to vacate the charter by process of law, to revoke the charter if it should appear to the Queen in Council that the company have failed to fulfil any material condition of the charter. The South Africa charter also contains a provision empowering the Crown to determine the charter at the end of twenty-five years on certain terms, and reserving the right of the Crown to annex any part of the company's territories to the Queen's dominions.

A word must be said in conclusion about the position of chartered companies from the point of view of international law. At the time of granting the North Borneo charter the English Government denied that they thereby assumed any protectorate over the company's territory. International law on this and kindred points is still in a state of growth, and not yet clearly defined; but, as Professor Westlake writes, "An incorporated public company is the creation of the law or the government of the country to which it owes its corporate existence and powers, and, if it is incorporated for an object which brings it into relation with foreign States, the State which has created it cannot escape responsibility for the acts of its creature." The territories of all the existing chartered companies have now been taken under British protection, but the international responsibilities of a State for what is done in its protectorate are not yet fully settled (see PROTECTORATE). It should be observed that the system of government by chartered company has received international recognition in Article IV. of the Brussels General Act of 1890 (Hertslet, *Map of Africa by Treaty*, vol. i. p. 54), as follows:—

"The powers exercising sovereignty or protectorate in Africa may, how-

ever, delegate to *chartered companies* all or a portion of the engagements which they assume in virtue of Article III. (relative to the repression of the Slave Trade). They remain, nevertheless, directly responsible for the engagements which they contract by this general Act, and guarantee the execution thereof."

This article involves a recognition by each of the signatory States of the jurisdiction of the company over the subjects of such State within the company's territories, seeing that such jurisdiction is essential to the fulfilment by the company of the duties it is authorised to undertake. With regard to foreign chartered companies it is only possible here to refer to the authorities mentioned below.

[*Authorities*.—Anderson, *Origin of English Commerce*; Cunningham, *Growth of English Industry and Commerce*; Schanz, *Englische Handelspolitik*; Chitty, *Commercial Law*; Cawston and Keane, *Early Chartered Companies*. As to modern English companies, Westlake, *International Law*; Hall, *Foreign Jurisdiction of the British Crown*; Lawrence, *Principles of International Law*; and generally on the whole subject, Bonmassieux, *Les Grandes Compagnies de Commerce*, Paris, 1892.]

Companies, City.—The origin of the city companies is to be found in the mediæval trade or craft guilds, which make their first appearance in England in the reign of Henry I. (1100–35). [For their history, which cannot be treated of here, see Brentano on *Guilds*, or Gross's *Gild Merchant*.] By the terms of a charter of Edward II., granted early in the fourteenth century, admission to the freedom of the city of London was confined to members of some "trade or mystery," unless by full assent of the whole commonalty, except in the case of apprentices, who might still be admitted according to ancient form. This was an alteration of the original qualification for citizenship, which had been merely residence or occupation, and the payment of "scot and lot," i.e. the payment of a share towards the common civic burdens, and the readiness to sustain leet offices; to which had been added, on the incorporation of the city in the reign of Richard I., enrolment as a freeman or member of the corporation. By an ordinance issued by the general body of citizens in 1376, the trade guilds or companies were directed to nominate the persons who (being freemen of the city) should vote at the elections in the common hall of the lord mayor, sheriffs, officers of the corporation, and representatives in Parliament; while in 1384 the same body enacted another ordinance instituting the Court of Common Council as the representative body of the citizens for internal affairs, and providing that it should consist of citizens elected by the freemen occupiers paying scot and bearing lot.

In 1475, another ordinance directed that the companies should nominate as electors only their liverymen, that is, freemen of the companies and the city, to whom a distinctive dress had been assigned by their company. On this footing the franchises of the city remained for 250 years; but as the result of an Act of Parliament passed in 1725 (11 Geo. I. c. 18), and of the Reform Bills of 1832 and 1867, the right of election of the lord mayor, sheriffs, chamberlain, and other civic officers is the only franchise now possessed exclusively by liverymen, though livery and freedom obtained by birth or servitude is still one qualification for the parliamentary franchise in the city, subject to a condition of residence within twenty-five miles of the city. In the course of centuries the character of the companies has entirely changed, and instead of consisting as formerly of real traders

resident in the city, their members are now chiefly admitted by payment or "redemption," and are not residents or traders in the city at all. The companies are chiefly noticeable for their wealth, which, formerly a frequent prey to the rapacity of English kings, is now always freely given for charitable objects, and for the hospitality of their civic feasts. Some of their funds are held on charitable trusts, others on no trust at all. They are frequently owners of large landed property and patrons of advowsons, and some, *e.g.* the Merchant Taylors, administer schools and other charities. They are also benefit societies, granting pensions to impecunious members and their families. There are at present twelve "great" companies, and sixty-two minor ones. Each company has its own officers, and in most cases its own hall. For admission by "redemption" a considerable sum has usually to be paid; but "patrimony" (*i.e.* the being a child of a member), and "servitude" or apprenticeship, are titles to admission almost without payment, though a large payment has always to be made on taking up the livery. Distinguished persons are sometimes admitted, *honoris causa*, without fees. The governing body of each company is called the court of assistants, and further fees have to be paid on admission to this. Certain of the companies exercise by statute or custom public powers, *e.g.* the Goldsmiths' Company assays and marks plate. For a complete list of these powers, and also of the companies, see the Report of the Royal Commission on the Livery Companies (Parliamentary Papers, 1884, 39. 1), at pp. 19, 26, 27.

[*Authorities.*—Gross, *Gild Merchant*; Norton, *City of London*, 3rd ed., Report of the Royal Commission on the Livery Companies, *ubi supra*.]

Companions (Knights Companions) of the Garter.—The Order of the Garter is the most ancient and illustrious of the Royal Orders of Knighthood existing in Great Britain or Europe. It was instituted by Edward III. on some not precisely determined date in 1347 or 1348, though in this as in other cases (see BATH, ORDER OF THE) an indeterminate antiquity has been claimed for it. The occasion on which the Order was established, the origin of its chief insignia, the Garter, with its motto "*Honi soit qui mal y pense*," which forms part of the Royal Arms of England, are all matters of antiquarian dispute. It was dedicated to St. George of Cappadocia—whence "The George," an equestrian figure of the saint and the dragon worn on the collar, and also suspended over the left shoulder by a dark-blue ribbon—and to St. Edward the Confessor. Its annual feasts or conventions were held on St. George's day (23rd April), at Windsor, in the Round Tower, whose site is associated with the traditions of King Arthur and his knights; and they continued from the reign of Edward III. to that of Elizabeth. The history of the Order, however, is only precise and regular from the end of Henry VIII.'s reign, as its annals for two centuries after its founding are imperfect, and the original statutes have perished. The conventions ceased in the reign of Charles II.

Originally the Companionship consisted of the sovereign and twenty-five knights; but at various times since the reign of George III. the sons and descendants of the sovereign have been made eligible, though the Chapter might be complete. The Prince of Wales for the time being was declared in 1805 to be a constituent part of the original institution.

The installation of knights, with the elaborate ceremonies formerly in use, and the meetings of the Chapter, have been discontinued since the reign of George III.; and under special statutes extra knights have been

authorised to be created, including many foreign sovereigns; so that the number at present is forty-nine.

The Bishops of Winchester and Oxford are, *ex officio*, the Prelate and Chancellor, respectively, of the Order; and the Prelate by the constitution of the Order takes precedence of every other bishop except those of London and Durham, who were subsequently placed above them by an Act of Henry VIII. The Dean of Windsor is *ex officio* the Registrar; and the other officers are Garter King at Arms and the Usher of the Black Rod. (See BLACK ROD, GENTLEMAN USHER OF.)

The Companions usually belong to the highest class of the peerage; but the knighthood, of itself, ranks them immediately after the eldest sons of barons, and their eldest sons after the eldest sons of baronets.

The designation of the Order is the Most Noble Order of the Garter.

[*Authorities*.—Nicolas, *Orders of Knighthood*; Ashmole, *Order of the Garter*; Anstis, *Order of the Garter*; Burke, *Knightage*, p. 12, and *Orders of Knighthood*, p. 97.]

Company.

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The co-operative principle—which lies at the root of company enterprise—is not a discovery of our age. Merchant joint-stock companies were well known in the sixteenth century, but they were seldom successful. It was not until the principle of limited liability was engrafted on that of co-operation that the magic potency of the co-operative principle began to manifest itself. From that date company enterprise has advanced by leaps and bounds. The number of companies registered in 1862 was 153; in 1896 it was 4236. The total number registered under the Act of 1862 has been 50,000. The paid-up capital embarked is more than a thousand millions.

The Companies Act of 1862, which marks this new and striking departure, was intended to form a complete code of company law for the whole United Kingdom.

Illegality of Unregistered Associations.—This Act begins by providing (s. 4) that no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of the Act for the purpose of carrying on any business which has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under the Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries (*q.v.*). In the case of banking the number is limited to ten. "Business" in this section has a more extensive signification than trade. Anything which occupies the time and attention and labour of a man for the purpose of profit is business (*Smith v. Anderson*, 1880, 15 Ch. D. 258). What is an "association carrying on a business for the acquisition of gain" has been much debated. Co-ownership or a common interest in property does not constitute an "association." There must be a joint relation between such persons for carrying on a business, that is for doing a succession of acts having the acquisition of gain for their object. A mutual marine insurance society is an association having for its object the acquisition of gain by the individual members thereof within sec. 4 (*In re Paulston Total Loss Association*, 1882, 20 Ch. D. 137), for indemnity against loss is a gain within sec. 4. Gain is not limited to pecuniary gain or commercial profits (*In re Arthur Accrington Association*, 1875, L. R. 10 Ch. 545), but where the property of an association is vested in a body of trustees for it, less than twenty in number, and such trustees carry on the business, *not as agents of the association*, but independently in their own names and on their own personal responsibility, the association does not "carry on business." This principle is illustrated in several cases (*Crowther v. Thorley*, 1884, 32 W. R. 330; *Wigfield v. Potter*, 1881, 45 L. T. 612; and *Smith v. Anderson*, 1880, 15 Ch. D. 247, the case of a Trust Investment Company). If the persons who carry on the business are agents, not trustees, the association is illegal (*Ex parte Poppleton*, 1885, 51 L. T. 602).

A society of more than twenty members whose object was to form a fund

and out of it lend money to its members at interest for buying houses was held illegal for want of registration (*Shaw v. Benson*, 1883, 11 Q. B. D. 563); so, too, a society of more than twenty persons which carried on the business of making loans to the members out of a subscribed fund, the loans being put up to auction or balloted for (*Jennings v. Hammond*, 1882, 9 Q. B. D. 225; see, however, *Ex parte Poppleton*, *supra*, and *Shaw v. Simmons*, 1883, 12 Q. B. D. 117).

Formation of Company.—Having thus cleared the ground by prohibiting large and fluctuating bodies of persons trading without incorporation—which was a public mischief—the Legislature proceeds to provide a machinery for the formation of a company. It is a very simple machinery. “Any seven or more persons,” says sec. 7 of the Act, “associated for any lawful purpose, may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability.” The effect of this section has lately been considered by the House of Lords in *Salomon v. Salomon*, ([1897] App. Cas. 22), the so-called “one-man company” case, and the true meaning of the Legislature must now be taken to be that when once the formalities prescribed by the Companies Act have been complied with, when once there is a memorandum subscribed by seven persons for one share each (s. 8), and duly registered (ss. 17, 18), the company comes into existence as a real independent legal entity, and cannot be treated as a sham or an *alias* for the promoter, because six of the seven subscribers are his nominees or trustees—mere so-called dummies. Nor does it signify what were the motives or schemes of the promoter. There is nothing in the Companies Act prohibiting a man carrying on business in the name of a limited company.

Not only trading companies may register under the Act, but companies formed not for gain but for promoting art, science, religion, or charity (Companies Act, 1867, s. 23). Friendly and industrial societies may convert themselves into companies under the Act. Unlimited companies may re-register with limited liability (Companies Act, 1879, s. 4). Insurance companies must register (Companies Act, s. 210). A trade union cannot register, being specially provided for by the Trades Unions Act (34 & 35 Vict. c. 31, s. 5), nor can a foreign company register, but it may carry on business here, being accorded recognition by the comity of nations (*Bulkeley v. Schutz*, 1871, L. R. 3 P. C. 336; *Bateman v. Service*, 1889, 6 App. Cas. 386).

The Memorandum of Association.—The memorandum of association which is to form the basis of incorporation must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of, and attested by, one witness at least (Companies Act, s. 11). There must be not less than seven subscribers (*In re National Debenture Corporation*, [1891] 2 Ch. 505). An agent may subscribe, and he need not be authorised by deed (*In re Whitley Partners*, 1886, 32 Ch. D. 338). A foreigner may subscribe (*Princess of Reuss v. Bos*, L. R. 5 H. L. 199). So may an infant (*In re Nassau Phosphate Co.*, 1876, 2 Ch. D. 610), or a married woman. When subscribed and stamped, the memorandum, together with the articles (if any) (Companies Act, s. 12), is to be taken to the registrar of Joint Stock Companies to be registered. It is the duty of the registrar to see that the documents presented are in proper form, but nothing more. If they are *ex facie* regular, his duty is to retain and register them (*In re Nassau Phosphate Co.*, *supra*; *Peel's case*, 1866, L. R. 2 Ch. 682; *Princess of Reuss v. Bos*, *supra*). On registration, the registrar gives his certificate of incorporation (Companies Act, s. 18), and this certificate is conclusive that

all the formalities required by the Act have been complied with; but it is not conclusive if the company is one not authorised to register under the Act (*In Re Northumberland Banking Co.*, 1858, 2 De G. & J. 357), or where there are six subscribers only instead of seven. The duty chargeable on registration on the nominal capital of a company limited by shares is now an *ad valorem* stamp duty at the rate of 2 shillings for every £100 (Stamp Act, 1891, s. 112).

The Company Limited by Shares.—Companies registered under the Companies Act may be limited either by shares or by guarantee, or may be unlimited. Unlimited companies are almost extinct. Companies limited by guarantee will be mentioned later. We turn accordingly to the normal type—the company limited by shares. In forming such a company the first consideration is the memorandum of association.

Form and Contents of Memorandum.—The memorandum of association is, as Lord Cairns well described it, the charter of the company. Its form and contents are prescribed by the Act (Companies Act, s. 12, Sched. 2). It must contain, in the case of a company limited by shares, the following particulars:—

1. The name of the proposed company, with the addition of the word "Limited" as the last word in such name.

2. The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situated.

3. The objects for which the proposed company is formed.

4. A declaration that the liability of the members is limited.

5. The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount.

1. *Name.*—No company is, by sec. 20 of the Companies Act, 1862, to be registered under the same name as that of a subsisting company, or so nearly resembling it as to be calculated to deceive (*q.v.*). This is only a statutory declaration of the general law which prohibits one person from appropriating another's trade name (*Hendricks v. Montagu*, 1882, 30 W. R. 168; *Merchant Banking Co. of London v. Merchants Joint Stock Bank*, 1878, 9 Ch. D. 560; *The General Reversionary Investment Co. v. General Reversionary Society*, 1888, 1 Meg. 65). Instances of similarity where an injunction has been granted are—*Lee v. Haley*, 1869, L. R. 5 Ch. 155; *Hendricks v. Montagu*, *supra*; *Tussaud & Sons v. Tussaud*, 1890, 44 Ch. D. 678; *Rendle v. J. Edgecumbe, Rendle, & Co.*, 1890, 63 L. T. 94. Instances where an injunction has been refused are—*London Assurance v. London and Westminster Assurance Corp.*, 1863, 32 L. J. Ch. 664; *London and Provincial Law Assurance Co. v. London and Provincial Joint Stock Life Assurance*, 1847, 17 L. J. Ch. 37; *Merchant Banking Co. of London v. Merchants Joint Stock Bank*, *supra*; *Australian Mortgage, Land, and Finance Co. v. Australian and New Zealand Mortgage Co.*, W. N. 1880, 6.

A company may change its name, by special resolution, with the approval of the Board of Trade (Companies Act, s. 13).

The name of a company may sometimes be important in construing its objects as defined by its memorandum (*In re The Crown Bank*, 1890, 59 L. J. Ch. 739).

2. *Situation of Registered Office.*—The place where the registered office of a company is situated constitutes generally the domicile of the company, but not necessarily. See *Domicile*, *infra*, p. 206.

3. *Objects Clause.*—But by far the most important matter for consideration is the objects for which the company is formed, and the reason is that

the objects defined in the memorandum circumscribe the sphere of the company's activity. A company can make no contracts and do no acts outside the ambit of its memorandum. This is the well-known doctrine of *ultra vires*, and a very wholesome and necessary doctrine. The Legislature gives a trading company its charter of incorporation for a definite purpose—to work a mine, or manage a business, or run a line of steamboats. It is not its policy to give the company a roving commission to do whatever a private individual might do. Shareholders subscribe their money on the faith of its being used for a particular purpose, not squandered on any miscellaneous enterprises a majority of the shareholders may decide on. This doctrine of *ultra vires* is, however, to be reasonably and not unreasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires* (*A.-G. v. Gt. Eastern Rwy. Co.*, 1887, 5 App. Cas. 478).

A trading company may, accordingly, do what is ordinarily and reasonably done in such business as it carries on. It may, for instance, while it is a going company, give a bonus to its servants with a view to getting better work out of them (*Hampson v. Price's Patent Candle Co.*, 1875, 24 W. R. 754; *Henderson v. Bank of Australasia*, 1888, 40 Ch. D. 170); or vote a gratuity to its officers (*Hutton v. West Cork Rwy. Co.*, 1883, 23 Ch. D. 654). An insurance company may pay claims outside its policies (*Taunton v. Royal Insurance Co.*, 1864, 2 Hem. & M. 135). A banking company may guarantee interest on debentures of a new company, the formation of which is important to the bank. An hotel company may let part of its premises, if it does not require the whole of them (*Simpson v. Westminster Palace Hotel Co.*, 1860, 8 H. L. 714). A mining company may buy the surface, though it has no power by its memorandum to acquire land (*John v. Balfour*, 1889, 1 Meg. 191). A trading company may, if authorised by its constitution, take shares in another company (*In re Barnett's Banking Co.*, 1867, L. R. 3 Ch. 112); it may sue in respect of a libel (*Metropolitan Saloon Omnibus Co.*, 1859, 4 H. & N. 87), though a municipal corporation cannot (*Manchester Corporation v. Williams*, [1890] 1 Q. B. 94); it may pay a reasonable amount, by way of brokerage, for placing its shares (*Metropolitan Coal Consumers Assoc. v. Scrimgeour*, [1895] 2 Q. B. 604), as it may for advertising the company. It has the same right as an individual of compromising claims against it or any dispute whatever (*Bath's case*, 1878, 8 Ch. D. 334).

Bills of Exchange.—A power to accept bills of exchange or issue negotiable instruments is not given to a company by the Companies Act, 1862, as an incident of its incorporation (*Peruvian Rwy. Co. v. Thames and M. Insurance Co.*, 1866, L. R. 2 Ch. 617); but a company may accept bills of exchange, or issue negotiable instruments where the terms of the memorandum of association authorise upon a fair construction the issue or acceptance of such bills or negotiable instruments, or where the business of the company is one which cannot, in the ordinary course, be carried on without bills. The test is, in the absence of express power, what is necessary to carry on the business under ordinary circumstances and in the usual way (*In re Cunningham & Co.*, 1887, 36 Ch. D. 538; *Atkin v. Wardle*, 1889, 61 L. T. 23). The liability of directors on bills may be put thus: If directors state that they are signing a promissory note or acceptance on behalf of or on account of the company, they do not make themselves personally liable; but if directors sign a promissory note or acceptance merely describing

themselves as directors, and not stating that they are acting on behalf of or on account of the company, they will be personally liable (*Dutton v. Marsh*, 1871, L. R. 6 Q. B. 361). They must show on the face of the note or bill that they are signing only as agents or "scribes."

A concluding general power is commonly inserted in the objects clause, "to do all such other things as are incidental or conducive to the attainment of the above objects, or any of them," and these words may in exceptional cases enlarge the company's powers. In *Peruvian Ry. Co. v. Thames and M. Insurance Co.*, 1866, L. R. 2 Ch. 617, Lord Cairns held that they gave a power to a railway company which was to pay for its concession by instalments,—a power which it would not otherwise have had—of giving bills of exchange, but if a company is formed for a definite purpose to buy a particular mine, say in Australia, it cannot buy one instead in South Africa because the memorandum adds "or elsewhere" (*In re Coolgardie*, W. N. 1897; *In re Haven Gold Mining Co.*, 1881, 20 Ch. D. 151); nor can the company's prospectus be invoked to enlarge the construction of the company's prospectus (*In re German Date Coffee Co.*, 1881, 20 Ch. D. 185).

On the other hand, it is *ultra vires* for a company—to give a few instances—to purchase its own shares (*Treror v. Whitworth*, 1887, 12 App. Cas. 409), or accept a surrender of shares which will result in an illegal reduction of capital (*Hope v. International Financial Society*, 1876, 4 Ch. D. 327); or to issue its shares at a discount (*Oregum Gold Mining Co. v. Roper*, [1892] App. Cas. 125); or to contract not to exercise powers given it for the public benefit (*Ayr Harbour Trustees v. Oswald*, 1883, 8 App. Cas. 623); or to subscribe (apart from an express authority) to a public object, such as the Imperial Institute (*Tomkinson v. S. E. Ry. Co.*, 1887, 35 Ch. D. 625); or to pay dividends out of capital (*Guinness v. Land Corporation of Ireland*, 1883, 22 Ch. D. 342); or to borrow beyond the limits defined in its articles (*Baroness Wenlock v. River Dee Commrs.*, 1884, 10 App. Cas. 354); or to pay out of its funds for sending stamped proxies to shareholders (*Studdert v. Grosvenor*, 1886, 35 Ch. D. 528). In cases of this kind the question often arises, "Is it a limitation of the constitution of the company, or does it merely restrict the agency of the directors?" (*Irvine v. Union Bank of Australia*, 1876, 2 App. Cas. 366, 374). If it is a mere restriction on the agency of the directors, and the act is *intra vires* the company, the shareholders may ratify it; but if the act is *ultra vires* the company, it is incapable of ratification (*Ashbury Ry. Co. v. Riche*, 1874, L. R. 7 H. L. 653); and any shareholder may get an injunction to restrain it (*Simpson v. Westminster Palace Hotel Co.*, 1860, 8 H. L. 712). Estoppel does not apply in a case of *ultra vires*. A company cannot be bound by estoppel to do something beyond its powers (*Bishop v. Balkis Consolidated Co.*, 1890, 63 L. T. 316).

4. *Liability Limited.*—The next statement required in the case of a limited company is that the liability is limited. "Limited liability" is in law merely a special kind of contract which anyone may enter into if the party with whom he contracts consents: unlimited insurance companies often limited the claims of policyholders to the assets. The peculiarity of the privilege which the Legislature has conferred on companies under the Companies Act, 1862, is in allowing a company to import this term of limited liability into all its contracts merely by notice; but in granting the privilege the Legislature has taken all possible precautions to ensure that everyone dealing with the company shall be made aware of the limitation. It is for this reason that it requires the company always to add the word "Limited" to its name (*Atkin v. Wardle*, 1889, 61 L. T. 23), to state in its

memorandum of association that the company's liability is limited, to keep the word "Limited" painted outside its office, and to use it on all the company's bills of parcels, cheques, invoices, and receipts. By the Companies Act, 1867, the Legislature made the experiment of allowing companies while trading with limited liability to make the liability of the directors by the memorandum unlimited. This was in imitation of the French system of *société anonyme en commandite* with an unlimited liability on the part of the *gérant* (see **COMMANDITE**); but the Act has proved a dead letter.

5. *Capital*.—The last statement to be contained in the memorandum is the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount. This is the nominal capital of the company, distinct from its subscribed capital. A quotation will not be granted by the Stock Exchange committee unless the company's prospectus provides for issue of at least half of the nominal capital; and see *Preference Shares, infra*, p. 193, and *Reduction of Capital, infra*, p. 204.

Alteration of Memorandum.—Under the Companies Act, 1862, a trading company could not alter its memorandum of association except by increasing and consolidating its capital. The Acts of 1867 and 1877 allowed a company to reduce its capital subject to very stringent conditions, but, with these qualifications, a trading company was strictly bound to the objects stated in its memorandum, and the doctrine extended even to conditions in the memorandum not required by the Act to be stated therein (*Ashbury v. Watson*, 1885, 30 Ch. D. 376). This unalterability seriously hampered companies. A company might desire to take up a new branch of profitable business, but with an unreformed memorandum it could not do so. Its only course was to wind up and come out as a new company. The Companies (Memorandum of Association) Act, 1890, now meets this difficulty. It gives power to a company by special resolution to alter the provisions of its memorandum or deed of settlement with respect to the objects of the company, so far as may be required for any of the following purposes:—

- (a) To carry on its business more economically or more efficiently;
- (b) To attain its main purpose by new or improved means;
- (c) To enlarge or change the local area of its operations;
- (d) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company.
- (e) To restrict or abandon any of the objects specified in the memorandum of association or deed of settlement.

Such a resolution is not, however, to take effect until confirmed by the Court on petition, and before confirming it the Court is to be satisfied (s. 2) that the interests of debenture-holders and of creditors are safeguarded. The Court is also to have regard to rights and interests of the members or any particular class of them, as well as the creditors, and in confirming the resolution it may make it on terms or impose conditions, as altering the name where the proposed modification of the memorandum would make it misleading (*In re Oriental Telephone Co.*, W. N. 1891, 153; *In re Alliance Marine Assurance Co.*, [1892] 1 Ch. 300; *In re National Boiler Insurance Co.*, [1892] 1 Ch. 311; *In re Indian Mechanical Gold Extracting Co.*, W. N. 1891, 153; *In re Fleetwood Estate Co.*, W. N. 1897, 20), or in granting borrowing powers by restricting the amount to be borrowed (*In re Reverendary Society*, [1892] 1 Ch. 615). The Court may, in lieu of requiring alteration of the company's name, direct the order to be advertised (*In re Copper Mines Tinplate Co.*, W. N. 1897, 20).

It will be observed that the Legislature has carefully specified the various purposes for which alteration is to be allowed, and the proposed alterations made by the resolution of shareholders must be confined to those purposes (*In re Government Stock Investment Co.*, [1891] 1 Ch. 649; *In re Spiers & Pond*, 1895, W. N. 135 (2)). Thus, where the main purpose of a trust company was investment in Government securities, the Court refused to sanction a resolution giving power to invest in securities not guaranteed by Government, but the refusal was made at the instance of debenture-holders. The Act has been found very useful, and companies of all sorts have availed themselves of its facilities—insurance and guarantee companies, to take in cognate subjects of insurance or guarantee (*In re Alliance Marine*, *supra*; *In re National Boiler*, *supra*); trust investment companies, to enlarge the sphere of their investments (*In re Foreign and Colonial Trust Co.*, [1891] 2 Ch. 395; *In re Government Stock Co.*, *supra*); other companies, to enlarge the geographical area of their operations (*In re Indian Mechanical Gold Extracting Co.*, [1891] 3 Ch. 538); others, to create or extend their borrowing powers (*In re Empire Trust*, 1891, 64 L. T. 221; *In re Reversionary Interest Society*, [1892] 1 Ch. 615). To obtain the sanction of the Court a petition is presented followed by a summons to proceed in chambers (*In re Land Corporation*, 1891, 91 L. T. N. 176; and see *In re Omnium Investment Co.*, [1895] 2 Ch. 127).

Articles of Association.—In the case of a company limited by shares the memorandum may be, and usually is, accompanied when registered by articles of association. If no articles are registered, the model articles, the regulations of Table A, are to apply. These articles, which are to be expressed in separate paragraphs numbered arithmetically and printed (Companies Act, ss. 14, 16), are the company's rules of internal management and government (*Laurence's case*, 1866, L. R. 2 Ch. 424). Like the memorandum, the articles are to be stamped as a deed and signed by each subscriber in the presence of, and be attested by, one witness at least. When registered they bind the company and its members as if each member had subscribed his name and affixed his seal (Companies Act, s. 16). Their relation to the memorandum of association is very clearly expressed by Lord Cairns in *Ashbury Ryw. Co. v. Riche*, 1885, L. R. 7 H. L. 653. "The articles of association," says Lord Cairns, "play a subsidiary part to the memorandum of association. They accept the memorandum of association as the charter of the company, and so accepting it the articles proceed to define the duties, the rights, and the powers of the governing body, as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made."

The articles cannot alter or vary that which would be the result of the memorandum standing alone (*Guinness v. Land Corporation of Ireland*, 1872, 22 Ch. D. 376); but the memorandum and articles, as contemporaneous documents, must be read together, so that if there is any ambiguity in one the other may explain or interpret it (*Anderson's case*, 1877, 7 Ch. D. 99; *In re Phoenix Bessemer Steel Co.*, 1875, 44 L. J. Ch. 685; *In re Pyle Works*, 1890, 44 Ch. D. 534); or if the memorandum is silent on a matter not required to be stated therein, the articles may supplement it (*Harrison v. Mexican Ryw. Co.*, 1875, L. R. 19 Eq. 358).

Two points require attention in connection with a company's articles. The first is that the articles are merely a contract by the shareholders *inter se*; the terms on which they agree that the business of the company shall be carried on. They do not constitute a contract with a person out-

side the company (*Eley v. Positive Assurance Co.*, 1876, L. R. 1 Ex. D. 88), or even with a person who is a signatory of the memorandum and articles (*In re Dale v. Plant*, 1889, 61 L. T. 207). If, for instance, the articles nominate a solicitor or a surveyor to be the solicitor or surveyor of the company, the solicitor or surveyor so nominated cannot sue the company as having contracted to appoint him (*In re Rotherham Alum and Chemical Co.*, 1883, 25 Ch. D. 103). The nomination in the articles merely amounts to an authority to the directors by the company, *i.e.* the shareholders, to appoint the person in question.

Constructive Notice of Company's Constitution.—The next point to be borne in mind is that everyone dealing with the company, whether shareholder or outside creditor, must be taken to have notice of its memorandum and articles, and to deal with the company on the basis of its constitution as therein declared (*Marshall v. Glamorgan Iron and Coal Co.*, 1868, L. R. 7 Eq. 137; *Oakbank Oil Co. v. Crum*, 1882, 8 App. Cas. 71; *Small v. Smith*, 1884, 10 App. Cas. 138). But this constructive notice extends only to the "external position" of the company, not to its "indoor management," to use the language of Lord Hatherley (*In re Land Credit Co. of Ireland*, 1868, L. R. 4 Ch. 469). With respect to the indoor management—the internal regulations of the company—a person dealing with the company is entitled, if everything is *ex facie* regular according to the company's constitution, to presume *omnia rite acta* (*Howard v. Patent Ivory Co.*, 1888, 38 Ch. D. 156). Some articles are imperative, others directory (see *In re Norwich Yarn Co.*, 1856, 22 Beav. 160; *Foss v. Harbottle*, 1842, 2 Hare, 461).

Most of the ordinary provisions in articles, such, for instance, as those relating to the appointment and rotation of directors, the powers of directors, the making of calls, the transfer and forfeiture of shares, the meetings of shareholders, the borrowing of money, etc., are dealt with under their several headings, but there are a few miscellaneous clauses often inserted in articles which may be briefly noticed. One is a clause in articles that any member who commences legal proceedings against the directors shall forfeit his shares on being paid their market value. A clause like this does not apply to an action to restrain the directors from doing illegal acts. Any stipulation that a shareholder shall not appeal to a court of justice is bad (*Hope v. International Financial Society*, 1876, 4 Ch. D. 327). Articles, again, sometimes give directors a discretion as to allowing inspection of the company's books by a shareholder. This will not entitle the directors to resist discovery in adverse litigation by a shareholder (*Gouraud v. Edison Gainer Bell Telephone Co.*, 1888, 57 L. J. Ch. 498). It has no application either after the company has gone into winding up (*In re Yorkshire Fibre Co.*, 1870, L. R. 9 Eq. 650)—real winding up, that is, not nominal, *e.g.* for the purpose of reducing capital only (*Ex parte Davis*, 1868, 16 W. R. 668). An article authorising directors to pay interest on capital otherwise than out of profits is *ultra vires* (*Masonic and General Assurance Co. v. Sharpe*, [1892] 1 Ch. 154).

Alteration of Articles.—A company's articles may always be altered by special resolution (Companies Act, s. 50) within the limits of its memorandum (*Ashbury Ryw. Co. v. Riche*, L. R. 7 H. L. 671, 678), and it is not competent to the company to except any article from alterability (*Walker v. London Tramways Co.*, 1879, 12 Ch. D. 705; *Malleson v. National Insurance Co.*, [1894] 1 Ch. 200). Directors cannot, of course, by any resolution of their own alter the articles—the constitution of the company (*Ranken's case*, W. N. 1897, 157). A company desirous of taking power to do something not within its articles must first alter the

articles and then exercise the power. It cannot do both simultaneously (*In re West India and India and Pacific Steamship Co.*, 1873, L. R. 9 Ch. 11 n.; *In re Patent Invest. Sugar Co.*, 1886, 31 Ch. D. 166; *Hippisley's case*, 1873, L. R. 9 Ch. 1; *Taylor v. Pilsen*, 1883, 50 L. T. 480).

Directors.—A company as an abstract entity cannot act of itself. It must act by agents. Those managing agents are commonly known as directors. At one time it was usual to speak of directors as trustees, but this view has been considerably modified. "They certainly are not trustees," said Kay, J., in *Faure v. Electric Light Co.*, 1890, 40 Ch. D. 150, "in the sense of that word as used with reference to an instrument of trust, such as a marriage settlement or will. They are managing agents of a trading association." The element of truth in speaking of directors as trustees is, that the fiduciary relation of the ordinary agent is in their case accentuated by the fact that their principal—the company—is a mere abstraction, thus relegating to the directors an almost uncontrolled discretion in the management of the company's funds and the exercise of the company's powers.

Appointment.—Directors are usually named in the articles of association and their number fixed. It varies from three to seven, seldom more, a large number weakening the sense of individual responsibility. Under the articles contained in Table A the number of the directors and the names of the first directors are to be determined by the subscribers of the memorandum (Art. 52), and till they are so determined the subscribers of the memorandum are to be deemed to be directors (Art. 53). The power thus given to the subscribers of the memorandum—the statutory directors as they may be called—to appoint remains in force until an appointment of directors has been made. It is not lost by the fact that the first general meeting has been held without directors being appointed thereat (*John Morley Building Co. v. Barras*, [1891] 2 Ch. 393), but to be exercisable the company must have been first registered (*Möller v. Maclean*, 1 Meg. 274). The subscribers need not meet for the purpose of appointing, as directors must. It is enough if they have determined the number and names of the directors in any way, e.g. by writing (*In re Great Northern Salt Co.*, 1890, 44 Ch. D. 472), but in such a case—where they do not meet—all the subscribers must sign, and not merely a majority (*John Morley Building Co. v. Barras*, *supra*). A majority of the subscribers of the memorandum assembled at a meeting is, however, competent to appoint directors (*York Tramways Co. v. Willows*, 1882, 8 Q. B. D. 685; *In re Johannesburg Hotel Co.*, [1891] 1 Ch. 125), but not a meeting of less than a majority (*In re London and Southern Counties Freehold Land Co.*, 1885, 31 Ch. D. 225). The notice of meeting must be a reasonable one. Two days is enough (*John Morley Building Co. v. Barras*, *supra*; and see *In re London Freehold Land Co.*, *supra*). Art. 35 of Table A requiring seven days' notice of meeting does not apply to a meeting of the subscribers of the memorandum. It has been held in an Irish case (*In re Ballina Light Rwy. Co.*, 1888, 21 L. R. Ir. 501) that if the subscribers of the memorandum are by the articles to appoint the first directors, and until directors are so appointed are to have the powers of directors, and the subscribers make default in appointing, they are chargeable in equity as if they had duly appointed themselves.

Directors, other than the first directors, are elected at the first general meeting of the company in each year. If any dispute arises as to the propriety of a director's election, the proper course is to call a general meeting of the company and get the thing set right (*Wandsworth Gas Co.*

v. Wright, 1870, 22 L. T. 405; and see *John Morley Building Co. v. Barras*, [1891] 21 Ch. 394). It is entirely a matter for the company, not the Court; the Court will not grant specific performance of a contract so as to compel a company to take a person as managing director whom the company does not desire to act as such (*Bainbridge v. Smith*, 1889, 41 Ch. D. 474). The principle is the same as that which prevents the Court enforcing specifically a partnership agreement. Mutual confidence is the basis of the relation. Nor will the Court give effect to an agreement by which one company is to have the right of imposing directors on the shareholders of another company (*James v. Eve*, 1873, L. R. 6 H. L. 335). Directors who act as such, knowing their appointment to be invalid, thereby render themselves directors *de son tort*, and, though *de facto* directors only, are liable for any act of commission or omission on their part in the same way and to the same extent as if they had been *de jure* directors (*Coventry and Dixon's case*, 1880, 14 Ch. D. 670).

Retirement of Directors.—Under Table A, Art. 58, the whole of the directorate are to retire from office at the first general meeting, and one-third in each successive year; but the article now most generally adopted provides for retirement of one-third only of the directors at the first general meeting, as well as at general meetings in subsequent years, such one-third being selected by ballot in the first year, and afterwards those who have been longest in office. Any casual vacancy in the board may usually be filled up by the directors, but the appointee holds so long only as the vacating director would have retained his office. "Casual vacancy" means any vacancy not occurring by effluxion of time, that is, any vacancy occurring by death, resignation, or bankruptcy (*York Tramways Co. v. Willows*, 1881, 8 Q. B. D. 694). As retiring directors are eligible for re-election, the services of valuable directors are secured to the company. Directors may vacate office by becoming bankrupt, or lunatic, or insolvent, or by non-attendance for a long period at board meetings, by being interested in the profits of any contract with the company, by ceasing to hold their qualification, by resignation, and in other ways. A director being merely a member of a company contracting with the company whose director he is, does not usually vacate his office, but is only disentitled to vote. In these days of widespread shareholding a rule so stringent as to vacate office would seriously embarrass the company.

Defects in Authority of Directors.—Disqualifications of this kind or defects in the appointment of directors might cause serious inconvenience to persons dealing with the company in ignorance of them, and sec. 67 of the Companies Act accordingly provides that "until the contrary is proved, all appointments of directors, managers, or liquidators shall be deemed to be valid, and all acts done by such directors, managers, or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications." Art. 71 of Table A reproduces the same protective principle, omitting the words "until the contrary is proved." Sec. 67 is not restricted to dealings with the outside public, but applies to dealings with shareholders. It will validate, for instance, a call made by *de facto* directors, though after the call is made it is discovered that the directors were appointed at a general meeting called on insufficient notice (*British Medical and G. Life Assoc. v. Jones*, 1889, 61 L. T. 384); but the section only validates acts done before the invalidity of the appointment is shown (*In re Old Bridport Brewery Co.*, 1866, L. R. 2 Ch. 191; *In re Branksea Island Co.*, 1890, 1 Meg. 12). There is nothing to prevent a director of a company becoming

director of a rival company in the absence of any special prohibition in the articles (*London and Mashonaland Exploration Co. v. New Mashonaland Co.*, W. N., 1891, 165).

Qualification of Directors.—Table A requires no qualification in a director, but, as a rule, articles now contain a qualification clause, on the principle that a director should have a substantial stake in the company. A director required to qualify need not take his qualification from the company (*Brown's case*, 1873, L. R. 9 Ch. 102). To render a director liable there must be a contract by him to take the shares. The mere acceptance of the office of director, or acting as such, does not constitute such a contract (*In re Wheal Buller Consols*, 1888, 57 L. J. Ch. 336; *Onslow's case*, 1888, 57 L. J. Ch. 338 n.), the duty to observe the articles not being a contract *with the company*, but acceptance or acting may be evidence from which a contract may be inferred (*Brown's case*, L. R. 9 Ch. 102; *Lord Inchquin's case*, W. N., 1891, 84; *In re Issue Co.*, [1895] 1 Ch. 226; *In re Hercynia Copper Co.*, [1894] 2 Ch. 403; *Ex parte Cammell*, [1894] 2 Ch. 392; *In re Glory Paper Mills*, [1894] 3 Ch. 473; *Konrath's case*, 1893, 3 R. 288). The form in *Isaacs' case*, [1892] 2 Ch. 158, providing that if a director shall fail to acquire his qualification within a month he shall be "deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him," is effectual to fix the director, and is now commonly adopted. Even when there is a contract established, the director has a reasonable time for acquiring the qualification (*Karuth's case*, 1875, L. R. 20 Eq. 506; *Brett and Hewitt's case*, 1883, 49 L. T. 479); and if the company is wound up before a reasonable time has expired, he cannot be fixed as a contributory (see *In re Bolton & Co.*, [1894] 3 Ch. 356).

Powers of Directors.—Directors are special agents of the company in respect of the powers vested in them by the articles, but they may also be regarded as general agents of the company in matters not specially provided for and not foreign to the objects of the company. Their powers under the articles are usually of the widest description (*Ernest v. Nicholls*, 1856, 6 H. L. 419). By Art. 55 of Table A they may exercise all the powers of the company except such as are required to be exercised by the company in general meeting, and this policy is a sound one. Directors are commercial men managing a trading association, not like trustees; they have to carry on and consolidate the company's business, enter into contracts, invest the company's funds, appoint and dismiss servants, decide upon dividends, make calls, issue debentures, pass transfers *cum multis aliis*; and for these things they require a free hand. "In my opinion," said James, L.J., in *A.-G. v. Great Eastern Ry.*, 1879, 11 Ch. D. 480, "the majority of managing partners may be trusted and ought to be trusted in determining for themselves what they may do and to what extent they may go in matters indirectly connected with or arising out of their business relations with others." In gauging the powers of directors to bind the company a distinction must be borne in mind between actual authority and apparent authority. The actual authority is that which the directors derive from the articles of association; it may be given expressly, or it may be incidental to the doing of that which is ordinarily and reasonably done in such a business as the directors carry on (*Hutton v. West Cork Ry. Co.*, 1883, 23 Ch. D. 665). This is a real authority, but directors may transcend their real authority and do acts which are outside their proper authority as agents of the company, but which, for all a person dealing with the company knows, may be within their authority. The company, in such cases, is treated as holding out the directors to do this class of acts, and cannot disown

the agency. This is estoppel by apparent authority. "If," as Selwyn, L.J., said in *In re Land Credit Co. of Ireland*, 1868, L. R. 4 Ch. 469, "an act within the scope of the powers of a board of directors is done by them, a person contracting with the directors is not bound to see that certain preliminaries which ought to have been gone through on the part of the company have been gone through. He has a right to presume *omnia rite acta*. If, for instance, he is handed a share certificate which is *ex facie* regular, the company cannot set up against the shareholder that the certificate was forged by its secretary (*Shaw v. Port Philip Gold Mining Co.*, 1884, 13 Q. B. D. 193; *County of Gloucester Bank v. Rudry Merthyr Colliery Co.*, [1895] 1 Ch. 629; see *Totterdell v. Fareham Blue Brick Co.*, 1866, L. R. 1 C. P. 674). This principle—the right of a stranger dealing with the company to presume *omnia rite acta* as regards matters of "indoor management"—is constantly invoked where there have been irregularities as well as defects of authority in the directors and is essential to business. But it must always be taken in conjunction with the other principle, which requires persons dealing with a company to acquaint themselves with its constitution, that is, its memorandum and articles (*Royal British Bank v. Turquand*, 1857, 6 El. & Bl. 332). The distinction is well illustrated in *Howard v. Patent Ivory Co.*, 1888, 38 Ch. D. 156. There directors had, by the company's articles, a general power to borrow with the assent of a general meeting. Without such assent their power was limited by the articles to £1000. The directors without the assent of a general meeting issued debentures for £3000. If the debentures had been issued to a stranger this would have been good for the whole amount, for the lender could have no means of knowing whether the internal regulations had been complied with or not, the debentures being *ex facie* regular, but the debentures were issued to the directors, who had the means of knowing that the internal regulations had not been complied with, by obtaining the assent of a general meeting, and the Court held that the directors could only hold them for £1000. Directors are trustees of their powers for the company, and must exercise them for the benefit of the company, and not to promote their own private interests (*Ex parte Brown*, 1859, 19 Beav. 104; *Aberdeen Ry. Co. v. Blackie*, 1851, 1 Macq. H. L. Cas. 471; *Poole Jackson and Whyte's case*, 1878, 9 Ch. D. 322; *In re Canvey & Co.*, 1889, 42 Ch. D. 233). They must not use powers given to them for one purpose for another (*Bennett's case*, 1855, 5 De G., M. & G. 297). They cannot, for instance, wrest a power given them of sanctioning transfers to carry out an arrangement contrived and disguised for the purpose of affecting the retirement of a large body of shareholders; so if directors are exercising their powers *malâ fide*—hurrying on a general meeting in order to prevent unregistered transferees recording their votes—the Court will restrain them (*Cannon v. Trask*, 1875, L. R. 20 Eq. 669).

That is one leading principle of directors' law—the fiduciary exercise of their powers. Another is that directors, as agents, cannot, unless expressly empowered to do so, delegate their authority (*Cobb v. Becke*, 1870, L. R. 6 Q. B. 936), e.g. their power of allotting shares (*In re Leeds Banking Co.* 1866, L. R. 1 Ch. 561). They may employ skilled agents, such as actuaries or valuers, to assist them in the preparation of balance-sheets and estimates, for instance, or a manager to assist them in carrying on the business, but they must not surrender their judgment to anybody (*Leeds Estate Co. v. Shepherd*, 1887, 36 Ch. D. 786; *Cartmell's case*, 1874, L. R. 9 Ch. 696). Where articles authorise directors to delegate to a committee, as Art. 64 of Table A does, and they do so without fixing a quorum, the

whole committee must act (*In re Liverpool Household Stores Association*, 1880, 59 L. J. Ch. 624). To take a few examples of what directors may do and what they may not do. They may make a moderate expenditure on advertisements in launching the company, that is, on introducing it to the notice of the public (*In re Faure Electric Accumulator Co.*, 1889, 40 Ch. D. 115); on the same principle the Court of Appeal has now decided that directors may pay a reasonable amount by way of brokerage or commission— $2\frac{1}{2}$ per cent. in the particular case—to a stockbroker for placing the company's shares (*Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q. B. 604).

Allotment of Shares.—If directors have exercised a *bonâ fide* discretion in proceeding to allot shares, however unwisely, the Court will not treat the allotment as invalid (*In re Madrid Bank*, 1866, L. R. 2 Eq. 216), but a director may be guilty of misfeasance if, though acting *bonâ fide*, he allows shares to be allotted to his infant children (*In re Crenner and Wheal Abraham United Mining Co.*, 1872, L. R. 8 Ch. 45). An allotment made at a board of directors is bad if due notice has not been sent of the board meeting (*In re Portuguese C. Copper Mines*, 1889, 42 Ch. D. 161; *In re Homer District Gold Mines*, 1888, 39 Ch. D. 549). But where an allotment of shares has been made by an insufficient board, but is afterwards ratified by a full board, the ratification relates back and makes the allotment good, though the applicant has in the meanwhile withdrawn his application (*In re Portuguese C. Copper Mines*, *supra*). The first directors of a company allotting shares without having acquired that share-qualification, does not invalidate the allotment.

Directors may pay dividends and the Court will not interfere, unless the dividend is at variance with the articles of association (*Oakbank Oil Co. v. Crum*, 1882, 8 App. Cas. 65). They may, if authorised by the articles, forfeit or cancel shares (*Marshall v. Glamorgan Iron and Coal Co.*, 1868, L. R. 7 Eq. 136). They may make a *bonâ fide* compromise (*Lord Belhaven's case*, 1864, 3 De G., J. & S. 41), for a company has the same power of compromising any dispute as an individual (*Bath's case*, 1878, 8 Ch. D. 340), though it cannot let a shareholder off his contract to take shares, for such a release is no compromise (*In re Adams' case*, 1871, L. R. 13 Eq. 482). They may sue or not sue debtors to the company at their discretion (*In re Forest of Dean Coal Mining Co.*, 1878, 10 Ch. D. 452). They may pay just debts of the company in the ordinary course of business down to the date of winding-up, even though the creditor is a debtor (*Willmott v. London Celluloid Co.*, 1887, 31 Ch. D. 151). They may, if authorised to borrow, issue debentures at a discount (*In re Compagnie Generale de Bellegrat*, 1876, 4 Ch. D. 470). They may accept prepayment of shares, if the articles allow prepayment, including their own (*Sykes' case*, 1871, L. R. 13 Eq. 260; *Poole Jackson and Whyte's case*, 1878, 9 Ch. D. 322). They may, as incidental to their office, rectify the register of shares to prevent errors, though not so as to vary rights (*Shortridge v. Bosanquet*, 1852, 16 Beav. 97). When directors do acts in excess of their powers, but not in excess of the company's, the shareholders may ratify such acts by the resolution of a general meeting (*Grant v. United Kingdom Switchback Rwy. Co.*, 1889, 40 Ch. D. 135), and if they have done so, no liability will attach to the directors (*In re Liverpool Household Stores*, 1890, 59 L. J. Ch. 616). Full knowledge of the facts is necessary for ratification (*Phosphate of Lime Co. v. Green*, 1876, L. R. 7 C. P. 57; *La Banque Jacques Cartier v. La Banque d'Epargne de la Cité de Montreal*, 1887, 13 App. Cas. 111; and see *Bolton Partners v. Lambert*, 1889, 41 Ch. D. 295).

But in imputing ratification by acquiescence to a company, it is to be borne in mind that shareholders have a right to assume (unless they are informed to the contrary) that their directors are managing the company in accordance with their powers (*Riche v. Ashbury Rwy. Carriage Co.*, 1873, L. R. 9 Ex. 228). If the shareholders do not ratify the *ultra vires* acts of their directors, the directors stand personally liable on what is known as an implied warranty of authority. The principle is this: when an agent makes a contract on behalf of his principal he impliedly warrants that he has authority to bind that principal, and if it turns out that he has no authority to bind his principal, and the principal repudiates the obligation, and loss is thereby occasioned, then an action on the warranty can be maintained (*Beattie v. Lord Ebury*, 1871, L. R. 7 Ch. 777; *Collen v. Wright*, 8 El. & Bl. 657). Instances are where directors have, without having any authority, accepted bills (*West London Commercial Bank v. Kitson*, 1884, 13 Q. B. D. 360), drawn cheques (*Cherry v. Colonial Bank of Australasia*, 1869, L. R. 3 C. P. 24), borrowed money (*Richardson v. Williamson*, 1870, L. R. 6 Q. B. 276), or issued debentures (*Weeks v. Propert*, 1873, L. R. 8 C. P. 427). But the misrepresentation as to the agent having power to bind his principal must be a misrepresentation of fact and not of law (*Beattie v. Lord Ebury*, *supra*). The measure of damages for breach of warranty is what the plaintiff has lost by losing the contract which the defendant director warranted his authority to make (*In re National Coffee Palace Co.*, 1883, 24 Ch. D. 367; *Meek v. Wendt & Co.*, 1888, 21 Q. B. D. 126).

Fraud by Directors.—Directors may not only exceed their authority, but abuse it. They may be guilty of fraud. In such a case the rule of law is that a company is liable for all the acts of its servant within the scope of his authority, however much the servant acting as such may have abused that authority. There is no difference between fraud and any other wrong (*Barwick v. English Joint Stock Bank*, 1866, L. R. 2 Ex. 265; *Mackay v. Commercial Bank of New Brunswick*, 1873, L. R. 5 P. C. 394). A banking company was, for instance, held liable where the manager had, by a lying telegram, got a bill accepted in which the bank was interested (*Mackay v. Commercial Bank*, *supra*). So where a bank manager had given a fraudulent guarantee of a person's solvency (*Swift v. Winterbotham*, 1872, L. R. 8 Q. B. 244). It is not necessary that the company should have derived any benefit from the fraud (*British Mutual Banking Co. v. Charnwood Forest Rwy. Co.*, 1887, 18 Q. B. D. 717). But to render the company liable the agent must have been acting *for the company*, not for himself, *i.e.* to promote his own private ends (*British Mutual Banking Co. v. Charnwood Forest Rwy. Co.*, *supra*).

Fraud of Co-directors.—A director is not responsible for the fraud of his co-directors, for a director cannot be held liable for being defrauded: so to hold would make his position intolerable (*Land Credit Co. of Ireland v. Lord Fermoy*, 1870, L. R. 5 Ch. 772; *In re Charles Denham & Co.*, 1884, 25 Ch. D. 752). A director is not liable, for instance, if a cheque drawn with his sanction for a proper purpose, *e.g.* paying for stamps on share warrants, is misappropriated by a co-director (*Perry's case*, 1876, 34 L. T. 717), but if a fraudulent act is being done by his co-directors it is not enough for a director to protest (*Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381; *Grimwade v. Mutual Society*, 1885, 52 L. T. 417; *Ramskill v. Edwards*, 1886, 31 Ch. D. 100). What will constitute notice to a director of a fraudulent or *ultra vires* act on the part of his co-directors was discussed in *Ashurst v. Mason* 1875, L. R. 20 Eq. 225; *In re Reese River Silver Mining Co.*, W. N., 1867, 139. Notice may be implied from a director though he has not been present at

the meeting at which the wrong thing was done, hearing minutes recording the transaction read and confirmed, and see *In re Hampshire Land Co.*, [1896] 2 Ch. 743. The presumption is that a director will not disclose his fraud to his co-directors (*Kennedy v. Green*, 1835, 3 Myl. & K. 699). Where a new director, on joining the board, finds that irregularities or improprieties have been committed, he ought not to rush at once into Chancery (*In re Irrigation Co. of France*, 1871, L. R. 6 Ch. 191; and see *Turquand v. Marshall*, 1868, L. R. 4 Ch. 386).

If directors wrongfully exclude a co-director from acting as such, and thus inflict an individual injury on him, he can obtain an injunction to restrain them from doing so (*Pulbrook v. Richmond Mining Co.*, 1878, 9 Ch. D. 610).

Fees.—A director is not, from the mere fact of being a director, entitled to any remuneration for his services. His position is not that of a servant but of a managing partner (*Hutton v. West Cork Ry. Co.*, 1883, 23 Ch. D. 672). To recover remuneration he must show a contract (*Dunston v. Imperial Gas Co.*, 1820, 3 Barn. & Ald. 125), otherwise the fees are in the nature of a gratuity voted. Commonly the articles fix a remuneration, and if they do so it is an authority to the directors to pay themselves the amount of such fees (*Melhado v. Porte Allegre*, 1873, L. R. 9 C. P. 503). A person, however, who acts as director, with articles before him fixing the directors' fees, enters into a contract with the company to serve as a director at the rate of the remuneration contemplated by the articles (*Swabey v. Port Darwin Gold Mining Co.*, 1889, 1 Meg. 385), and for fees so agreed to be paid he may sue the company (*Eden v. Ridsdale's Ry. Lamp Co.*, 1889, 23 Q. B. D. 368; *In re Dale & Plant*, 1890, 43 Ch. D. 255). Where there is no contract a trading company may do what is ordinarily and reasonably done in such business as it carries on, with a view either to getting better work from its servants or attracting customers, but it can only vote its directors or officials a gratuity while the company is a going concern (*Hutton West Cork Ry. Co.*, 1883, 23 Ch. D. 654). "Gratitude is the expectation of future favours."

If directors improperly pay themselves remuneration they will be ordered to repay it, e.g. where no remuneration was by articles to be paid unless the company paid a dividend of £5 per cent., and a dividend of £5 per cent. had been paid, but never earned (*Leeds Estate Co. v. Shepherd*, 1887, 36 Ch. D. 808; and see *In re Hitchall Court*, 1887, 56 L. T. 280; *In re A. M. Wood's Ship and Woodite Protection Co.*, 1890, 2 Meg. 164).

There is no rule that directors' fees are only to be paid out of profits (*In re Lundy Granite Co.*, 1870, 26 L. T. 673). Directors may prepay their shares to discharge fees due to them (*Mason's case*, 1882, 30 W. R. 378; *Pool's case*, 1878, 9 Ch. D. 328; but see *Sykes' case*, 1871, L. R. 13 Eq. 255). A director-shareholder cannot prove for fees voted him by a general meeting in competition with creditors, such fees being due to him "in his character of a member" (*In re Leicester Club Co.*, 1885, 30 Ch. D. 627), but this is not so in the case of arrears of salary due to a managing director (*In re Dale & Plant*, 1889, 43 Ch. D. 255).

Directors' Liability.—Directors as agents merely of the company cannot be held personally liable for a breach of contract by the company, but whenever an agent is liable to third parties, directors will be liable; for instance, on a warranty of authority. When the liability would attach to the principal, and the principal only, the liability is the liability of the company (*Ferguson v. Wilson*, 1866, L. R. 2 Ch. 89). Nor can directors be held liable for being defrauded: so to hold would make their position intolerable

(*Land Credit Co. of Ireland v. Lord Fermoy*, 1870, L. R. 6 Ch. 772). Acts of misconduct by directors are commonly spoken of as misfeasance. It would be more correct to describe them as breaches of duty. The liability is correlative to and flows from the duty. Directors, as Jessel, M. R., said, in *In re Forest of Dean Coal Mining Co.*, 1878, 10 Ch. D. 452, are bound to use fair and reasonable diligence in the discharge of their duties and to act honestly, but they are not bound to do more (and see per Lord Hardwicke in *Charitable Corporation v. Sutton*, 2 Atk. 405). They are not liable, for instance, for a mere error of judgment (*Turquand v. Marshall*, 1868, L. R. 4 Ch. 386; *Grimwade v. Mutual Society*, 1884, 52 L. T. 409; *London Financial Association v. Kelk*, 1881, 20 Ch. D. 146). Thus where a company was formed expressly for the purchase of a bill-broking business which was known to have a large amount of ill-secured debts, the directors were held not liable for completing the purchase, although the transaction turned out absolutely ruinous (*Overend, Gurney, & Co. v. Gibb*, 1872, L. R. 5 H. L. 480); so directors were held not liable for approving a transfer of shares from a solvent to an insolvent shareholder, they having exercised a *bond fide* though erroneous judgment (*In re Faure Electric Accumulator Co.*, 1888, 40 Ch. D. 141); nor will they be held liable for going to allotment on an insufficient subscription if they have exercised a *bond fide* discretion in the matter (*In re Madrid Bank*, 1866, L. R. 2 Eq. 216; *In re Liverpool Household Stores*, 1890, 59 L. J. Ch. 621).

Misfeasance.—There are several classes of misfeasance. The principal is misapplying the funds of the company. It is a well-settled principle that the governing body of a trading corporation cannot in general use the funds of the community for any purpose other than those for which they were contributed (*Pickering v. Stephenson*, 1872, L. R. 14 Eq. 322). If directors apply the funds of the company to *ultra vires* purposes, they are liable to replace them, however honestly they may have acted, e.g. if they have misapprehended the scope of the company's objects (*Cullerne v. London and Suburban Building Society*, 1890, 39 W. R. 89; *In re Liverpool Household Stores*, 1890, 59 L. J. Ch. 519). A director cannot justify sanctioning an improper payment by asserting ignorance of the purposes for which the money was meant to be applied (*Land Credit Co. of Ireland v. Lord Fermoy*, 1869, L. R. 8 Eq. 12; *In re National Funds Assurance Co.*, 1878, 10 Ch. D. 128). Thus a director who signs cheques for the company is bound to inform himself of the purpose for which the cheques are being given (*Joint Stock Discount Co. v. Brown*, 1869, L. R. 8 Eq. 381; and see *Marzetti's case*, 1880, 28 W. R. 541). Other instances of misapplication are spending money in rigging the market (*Marzetti's case*, *supra*), in buying the company's shares (*Evans v. Coventry*, 1856, 8 De G., M. & G. 845; *Trevor v. Whitworth*, 1887, 12 App. Cas. 409), in bribing bankers to open an account (*In re Imperial Land Co. of Marseilles*, 1870, L. R. 10 Eq. 298), in paying dividends out of capital. This last is the commonest mode of misapplying a company's funds.

If directors declare a dividend or bonus relying on a balance-sheet *bond fide* made out with proper assistance, and showing as accurately as circumstances will permit the financial position of the company up to that date, the Court will not, without strong reasons, declare the dividend improper (*Rance's case*, 1870, L. R. 6 Ch. 104); but directors cannot delegate their responsibilities to agents. Though they may employ accountants and actuaries, they must still exercise their judgment as business men upon the balance-sheets and estimates submitted to them (*Leeds Estate Building Co. v. Shepherd*, 1887, 36 Ch. D. 787). The principal cases on payment

of dividends out of capital, besides the above, are *Flitcroft's case*, 1882, 21 Ch. D. 519; *In re Charles Denham*, 1883, 25 Ch. D. 752; *In re Oxford Building Society v. Investment Society*, 1886, 25 Ch. D. 502; *Municipal Freehold Land Co. v. Polkington*, 1890, 63 L. T. 238; *In re National Funds Assurance Co.*, 1878, 10 Ch. D. 126; *In re Sharpe, Masonic and General Life Assurance Co. v. Sharpe*, 35 Sol. J. 529. As to what are profits for purposes of dividends, see *Dividends, infra* p. 200.

Joint and Several Liability.—Where dividends have been improperly paid out of capital, the directors at the time when such dividends were respectively paid are jointly and severally liable for the amount so paid away in each year of their directorship, and will be ordered to repay the amount with interest at 4 per cent. (*Leeds Estate Co. v. Shepherd*, 1887, 36 Ch. D. 787).

Statute of Limitations.—Directors may set up the Statute of Limitations where the misfeasance is not due to "fraud or fraudulent breach of trust" (*In re Lands Allotment Co.*, [1894] 1 Ch. 616).

Directors may also be liable for negligence, or nonfeasance. The negligence for which a director will be held liable must be such as would make him liable in an action. Mere imprudence is not negligence nor is want of judgment (*Marzetti's case*, 1879, 28 W. R. 543). The imprudence or error of judgment to render a director liable must amount to *crassa negligentia* (*Overend, Gurney, & Co. v. Gibb*, 1873, L. R. 5 H. L. 480; *In re Liverpool Household Stores*, 1890, 59 L. J. Ch. 618). Nonfeasance is not misfeasance, unless it amounts to a breach of duty (*In re Wedgwood Coal and Iron Co.*, 1882, 31 W. R. 182). Directors not suing for a debt, for instance, is not misfeasance (*In re Forest of Dean Coal Mining Co.*, 1878, 10 Ch. D. 450), or allowing in their discretion calls to remain unpaid (*In re Liverpool Household Stores, supra*), or acting without their qualification (*In re Coventry & Dickson's case*, 1880, 14 Ch. D. 660); but a director signing cheques without inquiry as to their purpose is misfeasance (*Joint Stock Discount Co. v. Brown*, 1869, L. R. 8 Eq. 381). The commonest kind of misconduct by directors is the taking of secret profits. The rule that an agent cannot make any profit out of his agency without the consent of his principal applies with peculiar stringency between directors of joint-stock companies and their shareholders (*Hay's case*, 1875, L. R. 10 Ch. 593; *Boston Deep Sea Fishing Co. v. Ansell* 1888, 39 Ch. D. 339). A director must not put himself in a position in which his duty and his interest conflict (*Parker v. McKenna*, 1874, L. R. 10 Ch. 96). A director must not, for example, accept a retaining fee in the shape of shares, commission, or anything else of value from a vendor or promoter of the company or any other person with an adverse interest (*Benson v. Heathorn*, 1842, 1 Y. & C. C. 326). A director, secretary, or other agent of a company accepting such a secret present from the company's vendor or promoter receives it to the use of the company, and is liable to account, at the option of the company, either (by way of damages) for the value of the shares at the time they were presented to him or for the shares themselves and their proceeds if they have increased in value (*Pearson's case*, 1877, 5 Ch. D. 336; *McKay's case*, 1875, 2 Ch. D. 1; *Carling's case*, 1875, 1 Ch. D. 115; *Nant-y-glo Iron Works v. Grove*, 1878, 12 Ch. D. 738; *In re Newmax & Co.*, [1895] 1 Ch. 685). Directors may accept a present of shares if the transaction is a perfectly open and honest one (*In re British Seamless Paper Box Co.*, 1881, 17 Ch. D. 467). In this case the company was a private one, consisting of eight members only, who knew all about the transaction. It was not a secret profit. If articles sanction a director making a profit out of a contract with his company,

provided he declares his "interest" in such contract, it is not enough for him to state that he has an interest; he must state the nature of it (*Imperial Mercantile Credit Association v. Coleman*, 1874, L. R. 6 H. L. 198; *Turnbull v. West Riding Athletic Club*, 1894, W. N. 4). The cases in which directors in disregard of this elementary principle of agency have accepted their qualification from promoters or vendors are unfortunately numerous. *Pearson's case*, 1884, 5 Ch. D. 336; *Hay's case*, 1875, L. R. 10 Ch. 593; *De Ruviné's case*, 1877, 5 Ch. D. 306; *In re Carriage Co-operative Supply Association*, 1884, 27 Ch. D. 322, are some of the cases in which the directors have been required to account.

Secret Commission.—They must equally account for a secret commission received by them (*Boston Deep Sea Fishing Co. v. Ansell*, 1888, 39 Ch. D. 339; *Barrow's case*, 1880, 28 W. R. 341; *Metropolitan Bank v. Heiron*, 1880, 5 Ex. D. 319; *Lister v. Stubbs*, 1890, 45 Ch. D. 1).

Sale to Company.—If a director sells his own property or property in which he is interested, e.g. a coal mine or a ship, to the company without disclosing his ownership or interest, the company is entitled on discovering the truth to rescind or ratify the contract of purchase at its option (*In re Cape Breton Co.*, 1885, 29 Ch. D. 795) (affirmed *sub nom. Bentinck v. Fenn*, 1887, 12 App. Cas. 652); *North-West Transportation Co. v. Beatty*, 1887, 12 App. Cas. 589; but to establish a case of misfeasance in such a case it must be shown that the company has suffered, e.g. that the price at which the director sold his own property to the company without disclosure was in excess of the real value of the property (*Bentinck v. Fenn*, *supra*).

Criminal Liability.—The Court may, under sec. 167 of the Companies Act, in a winding-up by the Court, and under sec. 168 in a voluntary winding-up, direct the liquidator to prosecute directors. The Court has refused to do so where the funds were very small and the creditors opposed (*In re Eupion Fuel and Gas Co.*, W. N. 1875, 10; *In re Northern Counties Bank*, 1883, 31 W. R. 546), but the creditors' opposition must be *bond fide* (*In re Charles Denham & Co.*, 1884, 32 W. R. 970; and see *R. v. Stuart*, [1894] 1 Q. B. 310).

Board Meetings.—"Whatever authority," says Turner, L.J., in *Nicol's case* (*In re Royal British Bank*, 1859, 3 De G. & J. 440), "is given by shareholders to directors is given to them as a body and not to each of them individually, the reason of their being required to act together being, of course, that the company may have the benefit of their collective wisdom (*D'Arcy v. Tamar Rwy. Co.*, 1867, L. R. 2 Ex. 158; *In re Portuguese Consolidated Copper Mines*, 1889, 42 Ch. D. 167). The directors are to bind the company only when acting as a board (*In re Gt. Northern Salt and Chemical Works*, 1889, 59 L. J. Ch. 288). But a contract made by the directors may bind a company though the directors have never met—though their signatures have been collected at their private houses—if the person with whom the contract is made has a right to presume *omnia rite acta* (*In re Bonelli Telegraph Co.*, 1871, L. R. 12 Eq. 246; *D'Arcy v. Tamar Rwy. Co.*, *supra*)." It is a corollary from this principle that the company is entitled to have its directors act assembled in council, that every director who is within reach must have notice of every board meeting of the company (*Halifax Sugar Refining Co. v. Franklyn*, 1889, 59 L. J. Ch. 593). If notice of a meeting is not given or sent to all the directors to whom it could be given or sent, the meeting is a bad one, and an allotment of shares, for instance, made at it is invalid (*In re Portuguese Consolidated Copper Mines*, *supra*; *In re Homer District Gold*

Mines, 1888, 39 Ch. D. 546). Notice need not be given of the special business to be transacted at the meeting (*La Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788). Board meetings are usually held at the head office of the company, but there is nothing in the general law to prevent directors holding their meetings at such places as they think proper (*In re Regent United Service Stores*, 1878, 8 Ch. D. 83). The directors usually elect a chairman of their meetings (Table A, Art. 67). The directors cannot act by a quorum unless the articles authorise it, but they may act by a majority (*York Tramways Co. v. Willows*, 1882, 8 Q. B. D. 698).

Management: Accounts.—Directors must keep proper books of accounts—open to the inspection of members—and prepare and lay before the company, once at least every year, an income and expenditure account and a balance-sheet in the form given in the Companies Act. Directors who have omitted this duty may be held jointly and severally liable to repay sums by way of dividend improperly paid out of capital in consequence (*In re Oxford Benefit Building Society*, 1887, 35 Ch. D. 502; and see *Leeds Estate Co. v. Shepherd*, 1887, 36 Ch. D. 809). If directors declare a dividend or bonus relying on a balance-sheet *bonâ fide* made out with proper assistance, and showing as accurately as circumstances will permit the financial position of the company up to that date, the Court will not, without strong reasons, declare the dividend improper (*Raner's case*, 1871, L. R. 6 Ch. 104); but directors cannot delegate these responsibilities to agents. They may employ accountants and actuaries, but they must still exercise their judgment as business men upon the balance-sheets and estimates submitted to them (*Leeds Estate Building Co. v. Shepherd*, *supra*). Auditors—always provided for by the articles—are the agents of the shareholders (*Nicol's case*, 1859, 3 De G. & J. 440). They are also officers of the company and liable as such, but not if only *de facto* auditors and never duly appointed (*In re Western Counties Steam Bakeries Co.*, [1897] 1 Ch. 617). Their duties and liabilities have been very fully discussed lately in *In re Kingston Cotton Mills Co., No. 1*, [1896] 1 Ch. 6; *No. 2*, [1896] 2 Ch. 279. See AUDITORS.

Balance - Sheets.—Balance-sheets are for the protection of shareholders, but for the protection of the public the Legislature has further required (Companies Act, s. 27) every company under the Act with a capital divided into shares to send to the Registrar of Joint-Stock Companies every year, under a penalty, a summary of its capital and a list of members. The chief cases illustrating this duty of the company are—*Gibson v. Barton*, 1874, L. R. 10 Q. B. 329; *Edmonds v. Foster*, 1876, 45 L. J. M. C. 41; *In re Briton M. and G. Life Assoc.*, 1888, 39 Ch. D. 61; *R. v. Newton*, 1879, 48 L. J. M. C. 77; *R. v. Catholic L. and F. Instit.*, 1883, 48 L. T. 675.

Books.—Entries in the books of a company are evidence against the company in respect of the matters to which the entries relate, in the same way as the books kept by a tradesman are (*In re Branksea Island Co.* (No. 1), 1888, 1 Meg. 12, 23). Directors can create no lien on the company's books (*In re Capital Fire Insur. Assoc.*, 1883, 14 Ch. D. 408), nor can a mortgagee of the general effects of the company seize them (*In re Clyne Tinplate Co.*, 1882, 47 L. T. 439).

Secretary.—The secretary of a company is a mere servant (*Barnett v. South London Tramways Co.*, 1887, 18 Q. B. D. 815). He has no power to make representations as to the state of the company's business (*Partridge v. Albert Life Assur.*, 1872, 16 Sol. J. 199), or strike a name off the register (*Wheatcroft's case*, 1872, 29 L. T. 326).

Interference of Court.—The Court never interferes to prescribe to trading

companies what they shall do as to their own internal affairs (*Lambert v. Neuchatel Asphalte Co.*, 1882, 30 W. R. 914). Nothing could be more mischievous than such interference. The limit which the Court has laid down is a very definite and intelligible one. The sole question is whether the step about to be taken is within the competence of the shareholders as a body. If it is, the matter must be left to their discretion (*Macdougall v. Jersey Imperial Hotel Co.*, 1865, 2 Hem. & M. 534). So with directors' management. If they keep within their powers the Court will not interfere. It says in effect to a complaining shareholder: "If you want to alter the management of the affairs of the company, go to a general meeting, and if they agree with you they can pass a resolution obliging the directors to alter their course of proceeding" (*Isle of Wight Ry. Co. v. Tahourdin*, 1884, 25 Ch. D. 330; *In re Professional Benefit Building Society*, 1871, L. R. 6 Ch. 862). For instance, the Court will not interfere with the discretion of directors in making a call (*Odessa Tramways Co. v. Mendel*, 1878, 8 Ch. D. 235), or attributing certain items of expenditure to capital instead of income (*In re Bridgewater Navigation Co.*, [1891] 1 Ch. 176), or forming a reserve fund if the articles render such reserve fund optional (*Lambert v. Neuchatel Asphalte Co.*, 1882, 30 W. R. 913), or paying losses within an excepted risk under a fire policy (*Tannhorn v. Royal Insurance Co.*, 1864, 10 Jur. N. S. 291), or force directors on a company though duly elected against the wish of a general meeting (*Harben v. Phillips*, 1883, 23 Ch. D. 40), or compel directors to summon a meeting (*Macdougall v. Gardiner*, 1875, L. R. 10 Ch. 606). A shareholder who objects to the mode in which the company's business is carried on should retire. He cannot dissolve or wind up the company against the wish of the other shareholders (*Sweeney v. Smith*, 1868, L. R. 7 Eq. 324).

But the Court will interfere, either by injunction or by exacting an undertaking, to prevent directors acting in violation of the constitution of the company before the company can meet, if their so acting will be likely to do serious harm, such as transferring a shipping company's business from London to Southampton (*Harben v. Phillips*, 1883, 23 Ch. D. 32); and it will also interfere to prevent a majority benefiting themselves at the expense of the minority by, for instance, compromising an action for a consideration and appropriating the consideration among themselves (*Menier v. Hooper's Telegraph Works*, 1874, L. R. 9 Ch. 350).

Promoters and Promotion.—The constitution of a company, sketched above, is merely a means to an end—the carrying on by the company of some business, the building of a pier or a railway, the working of a mine or a patent. It is the person called a promoter who determines what this end shall be, and who sets the statutory machinery of formation in motion. Promoter is a term not of law but of business, summing up, as Bowen, L.J., said, a number of business operations familiar to the commercial world by which a company is generally brought into existence (*Whaley Bridge v. Green*, 1879, 5 Q. B. D. 109). Promoter in the Directors' Liability Act, 1890, s. 3, subs. (2), means a person who was a party to the preparation of the prospectus otherwise than in a professional capacity. Preparing or settling the prospectus, forming the company, negotiating agreements between vendors and an intended company, providing directors, making contracts for the company, or otherwise actively engaging either alone or in co-operation with others in the formation of a joint-stock company will make a man a promoter (*Bagnall v. Carlton*, 1877, 6 Ch. D. 382; *Emma Silver Mining Co. v. Grant*, 1879, 11 Ch. D. 936); but a mere projector is not a promoter (*Erlanger v.*

New Sombbrero Phosphate Co., 1877, 3 App. Cas. 1285). Whether a person is or is not a promoter is a question of fact, not of law, and must in each case be determined with due regard to all the circumstances (*In re Whaley Bridge v. Green*, *supra*). This is all that can be said. Persons combining as promoters of a joint-stock company are not partners so as to be liable for each other's acts (*Hamilton v. Smith*, 1858, 5 Jur. N. S. 32; *Reynell v. Lewis*, 1846, 15 Mee. & W. 517, 529), but they may be (*ibid.*). Promoting syndicates, incorporated and unincorporated, are very common now.

The promoter, as Lord Cairns remarks in *Erlanger v. New Sombbrero Co.* (*supra*), has in his hands the creation and moulding of the company. He has the power of defining how and when, and in what shape and under what supervision it shall start into existence and begin to act as a trading corporation. It is he who selects the directors, who gives them such powers as he chooses. It is he who settles the regulations of the company—regulations under which the company as soon as it comes into existence may find itself bound to anything, not in itself illegal, which the promoter may have chosen. This control of the promoter over the company—so plenary and absolute—involves a correlative responsibility, and out of this responsibility arises the doctrine, now well settled, of the fiduciary relation of the promoter towards the company he creates. It is an artificial doctrine this fiduciary relationship of the promoter, an extension of the doctrine of agency, a sort of agency by anticipation; for the promoter is not strictly speaking an agent of or trustee for the company before incorporation, but it is a salutary and necessary fiction of equity for the protection of the company. In virtue of this fiduciary relationship the promoter is accountable to the company for all moneys secretly obtained by him from it. *Secretly*, that is the gist of the wrong. The law does not say a promoter may not make a profit out of a company he promotes provided he makes full and fair disclosure to the company of what he is getting, and the company assents to it. There are three ways in which a promoter may get a profit legitimately. He may get it—(1) from the company; (2) from the company's vendor; or (3) he may be at once vendor and promoter, and get it in that way. (1) If, for instance, the articles of a company provide that promotion money, a sum say of £10,000, shall be paid by the company to its promoter for his services, nothing, legally speaking, can be said against it. (2) The promoter may receive a commission from the vendor in cash or fully-paid shares. To make him accountable to the company for such commission it must be shown that the price at which the property was sold to the company had been swollen and exaggerated purposely and fraudulently for the purpose of making the company pay promotion money in addition to what is understood to be the real purchase money, as between the parties. *Lydney and Wipool Iron Co. v. Bird*, 1886, 33 Ch. D. 85, is a good illustration of this. (3) The third case, where the promoter is also vendor, is well exemplified in *Erlanger v. New Sombbrero Phosphate Co.*, 1877, 3 App. Cas. 1236. The vendor-promoter there—a syndicate, of which Baron Erlanger was the animating spirit—had an island to sell, rich in phosphates. The syndicate formed a company to buy it, but the board of directors with which they furnished the company they created were their own nominees—mere dummies; under these circumstances the company was held entitled to rescission of the contract for sale. There is nothing, as Lord Cairns pointed out, to prevent an owner of property from promoting a company to buy it, but if he does so it is incumbent upon him—the promoter-vendor—to provide the company with an executive, that is to say, with a board of directors, who shall both be aware that the property

which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. The good sense of this is obvious. As to the rights of the company where rescission has become impossible, see *In re Cape Breton*, 1886, 29 Ch. D. 195, and *Ladywell Mining Co. v. Brookes*, 1887, 35 Ch. D. 413. A vendor-promoter will not be less a promoter by putting in a nominee-vendor to sell to the company (*Glosier v. Rolls*, 1890, 43 Ch. D. 442).

Preliminary Agreements.—In the process of promoting, a preliminary agreement is almost indispensable; the directors must be able when the company is formed to come forward with a well-defined scheme, must be able to tell the public that there is a property which the company has acquired or can acquire, and on what terms. For this purpose a preliminary agreement is prepared, and it takes commonly one of two forms: (i.) an agreement by the vendor with a trustee for the company, defeasible on non-adoption by the company; or (ii.) a draft agreement by the vendor with the company. In either case the agreement is referred to in the articles of the company when formed as proposed for adoption by the company, and the articles constitute an authority to the directors to adopt it; but such authority does not relieve the directors of the duty, as agents of the company, of taking the terms of the proposed agreement into careful consideration as business men, and seeing that the company is not being taken advantage of. The improvident adoption by directors of cut-and-dried agreements made by promoters, in their own interests, with the company, is one of the most common causes of ruin to companies. Where the agreement covers freeholds, leaseholds, etc., subject to a mortgage, patents, licences, trade marks, copyrights, book debts, goodwill, or the benefit of contracts, *ad valorem* duty will, under sec. 59 of the Stamp Act, 1891, have to be paid, but not where the agreement is for the sale of any estate or interest in (1) lands, tenements, hereditaments, or heritages; (2) property locally situate out of the United Kingdom; (3) goods, wares, or merchandise; (4) stock or marketable security; (5) any ship or vessel (see *Alpe*, *Stamp Duties*, 4th ed., 116-120).

The Prospectus—Office of.—Where a company is a public company as distinguished from a private company, that is to say, when it intends to appeal to the public to subscribe its capital, the first step after registration of the company is to issue a prospectus. The proper office of a prospectus is to invite the public to take shares in the new company. When the shares have been allotted, its office is exhausted, and the liability of those who issue the prospectus to the allottees does not follow the shares into the hands of the transferees (*Peck v. Gurney*, 1873, L. R. 6 H. L. 377).

Duty of those who Issue.—The prospectus issued to the public is the basis of the contract to take shares (*Pulsford v. Richards*, 1855, 17 Beav. 87), and those who put before the public such a prospectus to induce them to embark their money in a commercial enterprise ought, as Lord Herschell said in *Derry v. Peck*, 1889, 14 App. Cas. 337, 376, to be vigilant to see that it contains such representations only as are in strict accordance with fact. This duty, which requires in these days to be emphasised, is well stated by a very distinguished Vice-Chancellor (Kindersley) in words which Lord Hatherley called a "golden legacy." "Those who issue a prospectus," said the Vice-Chancellor, "holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy,

and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares" (*New Brunswick Central Ry. Co. v. Muggeridge*, 1860, 1 Drew. & Sm. 381), approved by Lord Chelmsford (*Central Ry. Co. of Venezuela v. Kisch*, 1867, L. R. 2 H. L. 113).

Disclosure of Contracts in.—Not content with this, the Legislature in the Companies Act, 1867, inserted a section (s. 38) requiring every prospectus to specify "the dates and names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of the prospectus"; in default, the prospectus to be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus unless he should have had notice of such contract. The section includes parole as well as written contracts (*Capel v. Simes Composition Co.*, 1888, 36 W. R. 689), and, as construed in *Gover's* case (*In re Coal Economising Co.*, 1875, 1 Ch. D. 200), covers every contract which would assist a person in determining whether he would become a shareholder in the company. It is no defence to non-disclosure that the promoter or director *bonâ fide* believed that the contracts need not by law be set out (*Twyeross v. Grant*, 1877, 2 C. P. D. 469). The difficulty of knowing what contracts to disclose, sometimes a disinclination to disclose them, has led to the adoption of a waiver clause in prospectuses. The validity of such a clause has never been adjudicated upon, but must be regarded as extremely doubtful. The remedy under the section for non-disclosure is a personal one against the wrong-doer (*Gover's* case, *supra*). *In re Bagnall & Co.*, 1875, 32 L. T. 536; *Cornell v. Hay*, 1873, L. R. 8 C. P. 328; *Sullivan v. Mitcalfe*, 1880, 5 C. P. D. 455; *Craig v. Phellins*, 1876, 3 Ch. D. 722; and *Redgrave v. Hurd*, 1881, 20 Ch. D. 14, are other illustrative cases.

Directors' Liability Act.—In the Directors' Liability Act, 1890, the Legislature has gone a step further, and has made liable for untrue statements in a prospectus not only persons who are directors at the time of the issue of the prospectus, but every person who has authorised himself being named in the prospectus as a director or as having agreed to become, either immediately or after an interval of time, a director, and every promoter of the company and every person who has authorised the issue of the prospectus. If a person's name is improperly inserted as director, he is to be entitled to indemnity or contribution (ss. 4, 5). It is a sarcastic commentary on the supposed necessity of this Act that there has not in the course of seven years been a single reported decision on it, but it may have made directors more careful.

Fraud and Misrepresentation in Prospectus.—Supposing then a prospectus to contain untrue statements, what are the remedies of a person who has taken shares on the faith of it? They are two: (1) an action for rescission of the contract; (2) an action of deceit.

Rescission.—First as to rescission. The statements in the prospectus are the basis of the contract between the shareholder and the company, and, if false, the company cannot keep the contract (*Ranger v. Great Western Ry. Co.*, 1857, 5 H. L. 86; *In re Reese River Silver Mining Co.*, 1867, L. R. 2 Ch. 615; *Central Ry. Co. of Venezuela v. Kisch*, 1867, L. R. 2 H. L. 99; *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 2 Ch. 178). It is only necessary to prove that there was a material misrepresentation (*Derry v. Peek*, 1889, 14 App. Cas. 337, 359). It makes no difference that

the misrepresentation was an innocent one (*Arkwright v. Newbould*, 1880, 17 Ch. D. 320). The misrepresentation must, however, be one of fact (*Eaglesfield v. Marquis of Londonderry*, 1876, 4 Ch. D. 709), and the shareholder must prove that he took the shares on the faith of it (*Jennings v. Broughton*, 1853, 17 Beav. 239); but it is not necessary that the misrepresentation should be the sole inducement (*Nicol's case*, 1859, 3 De G. & J. 420; *Arnison v. Smith*, 1889, 41 Ch. D. 369). A contract to take shares induced by misrepresentation or fraud is not, however, void, but voidable only at the option of the party defrauded. Until avoided it is valid (*Oakes v. Turquand*, 1867, L. R. 2 H. L. 375). The question therefore arises, Has the claimant for rescission with notice of the misrepresentation or fraud elected to affirm the contract, as, e.g., by dealing with the shares, or not? (*Clough v. London and N.-W. Ry. Co.*, 1871, L. R. 7 Ex. 35; *Nicol's case*, *supra*; *Ex parte Briggs*, 1866, L. R. 1 Eq. 483; *In re Mount Morgan West Gold Mines*, 1887, 56 L. T. 622). If he has, his remedy is gone. Delay in rescinding is not only evidence of an intention to affirm, but is a bar to rescission on another ground, viz. that the shareholder's name being on the register may have induced other persons in the meanwhile to alter their position (*In re Cachar Co.*, 1876, 2 Ch. D. 417). A man must not play fast and loose—he must not say, I will abide by the company if successful, and I will leave the company if it fails (*Ashley's case*, 1870, L. R. 9 Eq. 263); nor is it enough for the shareholder to repudiate (*Harc's case*, 1869, L. R. 4 Ch. 503). He must follow up the repudiation by taking steps to have his name removed from the register (*In re Scottish Petroleum Co.*, 1883, 23 Ch. D. 413). If he does so—if he commences an action to rescind before winding-up begins—he has a right to have his name removed from the register though a winding-up order is made before judgment for rescission (*Reese River Silver Mining Co. v. Smith*, 1869, L. R. 4 H. L. 64; *Ex parte Boyle*, 1885, 33 W. R. 450). If he does not, winding-up is an absolute bar to relief because the rights of creditors have intervened (*Oakes v. Turquand*, 1867, L. R. 2 H. L. 325). A *suppressio veri* in the prospectus may entitle a shareholder to rescission, but it must be a suppression of something which ought to be disclosed (*New Brunswick and Canada Ry. Co. v. Conybeare*, 1862, 9 H. L. 724). The following misrepresentations have been held to entitle to rescission: as to the persons to be directors (*In re Scottish Petroleum Co.*, *supra*); as to the price to be paid for a concession (*Central Ry. Co. of Venezuela v. Kisch*, 1867, L. R. 2 H. L. 99); as to there being a contract when there was only negotiation (*Ross v. Estates Investment Co.*, 1868, L. R. 3 Ch. 682); that a mine was “working” when it was worthless (*In re Reese River Silver Mining Co.*, 1866, L. R. 2 Ch. 604); as to shares having been subscribed when the subscription was only a sham (*Arnison v. Smith*, 1889, 40 Ch. D. 567). Cases in which it was held there was no sufficient misrepresentation are—*Bellars v. Tucker*, 1884, 13 Q. B. D. 562; as to prospective profits (*Moore v. Explosives Co.*, 1887, 56 L. J. Q. B. 235); as to manufacturing capacity (*Denton v. Macneil*, 1866, L. R. 2 Eq. 352, and *In re British Burmah Lead Co.*, 1887, 56 L. T. 815). A false report made by directors to a general meeting will not entitle a person who, on the faith of the report, buys shares from a shareholder to rescind his contract; but it is otherwise if he takes his shares from the company (*Ex parte Worth*, 1859, 4 Drew. 529). See also *New Brunswick Co. v. Conybeare*, 1864, 9 H. L. 724; *Nicol's case*, 1859, 3 De G. & J. 387).

Deceit, Action for.—The other remedy of a shareholder who has been induced to take shares by misrepresentation or fraud in the prospectus is an action for deceit. An action for deceit differs essentially from one brought to obtain rescission (*Derry v. Peek*, 1889, 14 App. Cas. 369). In an action

for deceit the plaintiff has to prove (i.) actual fraud; (ii.) that the fraud was an inducing cause to his contracting; (iii.) that he was misled by it; (iv.) that he suffered loss as a natural consequence of his doing so (*Smith v. Chadwick*, 1883, 9 App. Cas. 187; *Derry v. Peek*, *supra*). The Directors' Liability Act, 1890, has now made it no longer necessary in an action in the nature of deceit against directors to prove actual fraud. It is sufficient *prima facie* that the directors or persons responsible for the prospectus have made untrue statements therein. Once this is proved, the onus is then cast on the directors to prove that they had reasonable ground to believe, and did up to the time of the allotment of shares believe, that the statements were true. As to what is reasonable ground to believe, see *Glasier v. Rolls*, 1890, 42 Ch. D. 458; *Arnison v. Smith*, 1889, 41 Ch. D. 348; *Peek v. Derry*, 1887, 37 Ch. D. 541). If the untruth is contained in an extract from a report by an accountant, engineer, valuer, or other expert, the onus is on the directors to show that the extract was a fair representation of the report. Yet even then the director will be liable if it is proved that he had no reasonable ground to believe that the person making the report was competent to make it. A deceived shareholder's keeping the shares will not bar an action by him for deceit as it would for rescission (*Arnison v. Smith*, 1889, 41 Ch. D. 361).

The executor of a deceased director is not liable in an action of deceit, if the director's estate has got no benefit from the representation (*Peek v. Gurney*, 1873, L. R. 6 H. L. 393). An action for deceit is barred at the end of six years (21 Jac. I. c. 16).

A person who makes a false report or valuation recklessly or with gross negligence, knowing it is to be used to induce third persons to advance money on the faith of it, is personally liable to the persons so deceived (*Cann v. Willson*, 1888, 39 Ch. D. 39; see also *Scholes v. Brook*, 1890, 63 L. T. 837; 64 L. T. 674).

Underwriting Agreements.—Promoters do not always trust to a prospectus to get the capital they want. This is the age of insurance—an age in which every prudent man of business covers all the risks he can, and the risk of non-subscription of its capital is to a company a serious one. If it fails to get the funds it wants, it cannot carry out its projected purchase contracts, and the property is returned depreciated on the vendor's hands. To guard against this contingency the company's capital is often underwritten in whole or in part before issue. The form which the underwriting agreement usually takes is that of a letter addressed by the underwriter to the promoter, undertaking—that is offering to undertake—for a commission to subscribe or find responsible subscribers for say 10,000 shares—the underwriter's liability to be reduced rateably in the proportion in which the shares are subscribed by the public, and authorising the promoter, in the event of the underwriter not subscribing or finding responsible subscribers, to send in on the underwriter's behalf an application for the proper amount of shares which the underwriter is in the event bound to take. It was until recently supposed that a company could not properly pay for the placing of its shares (*Lydney and Wigpool Iron Co. v. Bird*, 1886, 33 Ch. D. 85; *In re Faure Electric Co.*, 1889, 40 Ch. D. 141); but the dicta in these cases have been reconsidered in *Metropolitan Coal Consumers Assoc. v. Scrimgeour*, [1895] 2 Q. B. 604; and it must now be taken that a limited company may pay a reasonable commission for getting its share capital subscribed as it may for advertising the company's properties. The commission allowed in that case as reasonable was 2½ per cent., but there are many companies which would not be underwritten on those terms, the

insurance rate varying, of course, with the sea-going qualities of the venture. In such a case, where a high rate of commission has to be paid to underwriters, it must be paid, if at all, by the promoter-vendor, and this is now the usual course.

Underwriting agreements have been frequently before the Courts of late; underwriters, if the company proves a failure, catching at every technicality to evade their obligations. The defences fall into two classes: either that some condition precedent has not been fulfilled (*In re Harvey Oyster Co.*, [1894] 2 Ch. 474; *Brussels Palace of Varieties v. Prockter*, 10 T. L. R. 72), or that there was no authority on the promoter's part to apply. On the latter point two cases are instructive—*In re Henry Bentley & Co.*, 1894, 69 L. T. 204, and *In re Consort Deep Level Gold Mining Co.*, [1897] 1 Ch. 575.

In the former, *In re Bentley & Co.*, there was on the face of the underwriting letter an apparent authority to the promoter to apply to the company for shares on the underwriter's behalf, qualified by a private letter between underwriter and promoter, but unknown to the company, and the underwriter was held estopped from denying the authority. In *In re Consort Deep Level Gold Mine (supra)* the defect of authority was apparent on the face of the application presented to the company, and the Court of Appeal decided there was no estoppel. An underwriting offer, like any other offer, must be accepted, and the acceptance communicated to the offerer, to constitute a contract in law; see also *Sangster v. Netter*, 1893, 9 T. L. R. 441, and *In re Hemp, Yarn, and Cordage Co.*, *Hindley's case*, [1896] 2 Ch. 121.

Going to Allotment.—If a company's capital is only partially subscribed, the directors have then the difficult task of deciding whether they will go to allotment or not. There is nothing in the Companies Acts to lead to the conclusion that no business can be carried on until the whole of the proposed capital has been subscribed (*M'Dougall v. Jersey Imperial Hotel Co.*, 1864, 10 Jur. N. S. 1043), and a shareholder cannot therefore get his money back on that ground, or on the inadequacy of the subscription, for each coadventurer has subscribed on the faith of all being embarked in one common undertaking (*Baird v. Ross*, 1856, 2 Macq. H. L. Cas. 61); but a company may, by its articles, provide—it rarely does—that the business of the company shall not be commenced until a definite amount or the whole capital has been subscribed (*Ornamental Pyrographic Woodwork Co. v. Brown*, 1864, 2 H. & C. 71). The subscription of the fixed amount is then a condition precedent to commencing business (*Peirce v. Jersey Waterworks Co.*, 1870, L. R. 5 Ex. 209; *North Stafford Steel Co. v. Ward*, 1867, L. R. 3 Ex. 172); and pending it the company remains in a state of suspended animation. If there is nothing about it in the articles, the directors must exercise their discretion as business men in going to allotment. When the subscriptions are so few that the scheme must necessarily become abortive, the directors ought to return the shareholders' money; but directors cannot be held liable for misfeasance in going to allotment on insufficient applications if they have acted *bond fide* (*In re Madrid Bank*, 1866, L. R. 2 Eq. 216; *Grimwade v. Mutual Society*, 1885, 52 L. T. 409). To render them liable in such a case there must not only be *mala fides*, but the allotments so made must have caused loss to the company (*In re Liverpool Household Stores*, 1890, 59 L. J. Ch. 621).

Private Companies.—There are a class of trading companies now very numerous—numbering, indeed, nearly a third of those registered in the course of the year—known as “private” companies. A private company is in all respects, in formation and constitution, the same as an ordinary

trading company, with this difference, that the private company does not appeal to the public for its capital. The genesis is this: A firm, or it may be a single trader, wishes to get the advantages of incorporation, and to obtain them the partners avail themselves of the machinery provided by the Companies Act. The business goes on just as before, only that the firm is clothed with a corporate character. Many advantages flow from incorporation, advantages which are forcibly pointed out by Mr. Palmer (*Co. Pre.*, 6th ed., 444). The chief of these advantages is, of course, that of trading with limited liability—a protection specially valuable to members of a firm in consequence of the serious risks which a partner, by the law of England, runs from the negligence or fraud of his copartner. There is the further advantage, that the powers of the directors of a company can be defined by articles of which all persons dealing with the company have notice. The restriction in a partnership deed on the powers of a partner is of no efficacy against outsiders dealing with the firm. The company can borrow very advantageously on debentures, which an individual or a firm cannot. Lastly, the continuity of a company is not disturbed either by the bankruptcy, lunacy, or death of individual shareholders, as a partnership is. This convenience is especially found where the principal partner in a firm dies. Such a partner must either direct his capital to be withdrawn—at great inconvenience to the firm—or authorise his executors to carry on the business, at great risk to his estate and to the executors personally. With a private company he can bequeath his shares to trustees, who can let the management continue without risk to themselves, and without serious risk—under limited liability—to the estate. Special provisions are usually inserted as to transfer of shares, *e.g.* that no share shall be transferred to a person not a member, so long as any member is willing to purchase (see Palmer, *Co. Pre.*, 6th ed., 463 *et seq.*).

Companies not Formed for Gain.—Besides trading companies formed for the acquisition of gain, the Companies Acts provide for the incorporation of associations not formed for the acquisition of gain, but to promote commerce, art, science, religion, charity, or any other useful object (Companies Act, 1867, s. 23). An association of this kind may, on proving to the Board of Trade that it is the intention of the association to apply its profits or income in promoting its objects, and not to permit payment of any dividend to the members,¹ obtain from the Board of Trade a licence to register with limited liability. This licence may be granted subject to conditions. The name club, society, chamber, or association can be used instead of company, which is a convenience. An association of this kind cannot hold more than two acres of land without the sanction of the Board of Trade (Companies Act, s. 21). The powers given by these sections have been largely used; for instance, for athletic and football clubs, for improving the breed of coach horses, for training the deaf, for working ladies' guilds, for musical societies, for law societies, for club-houses, for chambers of commerce, for charity. The most convenient way of constituting such a society is as a company limited by guarantee. The Board of Trade require the memorandum and articles to be settled by their counsel at the expense of the promoters, and a fee of five guineas for that purpose must accompany the application.

Shares.—"Share," as James, L.J., said in *Morice v. Aylmer*, 1884, L. R. 10 Ch. 155, "is a term indicating simply a right to participate in the profits of a particular joint-stock undertaking." A shareholder has merely a

¹ This does not prevent the association paying interest to a member on money borrowed from him.

right to a share in the profits of the trading. He has no right to sell any part of the property which belongs to the company as an undertaking. The business of the company is an entirety (*Bank of Hindustan*, 1870, L. R. 6 C. P. 74; *Zuccani v. Nacupai Gold Mining Co.*, 1888, 66 L. T. 23). A share is a chose in action (*Colonial Bank v. Whinney*, 1880, 11 App. Cas. 426) and personal estate (Companies Act, s. 22). Hence the shareholder's interest depends on the law of the company's domicile (*Colonial Bank v. Cady & Williams*, 1890, 15 App. Cas. 276).

Agreement to take Shares.—A man can only become a member of a company by contract (*Hamley's case*, 1877, 5 Ch. D. 706). To constitute a binding contract to take shares in a company, there must be an application by the intending shareholder, an acceptance by the company, and a notice of that acceptance to the applicant (*In re Scottish Petroleum Co.*, 1882, 23 Ch. D. 430). The application need not be in writing (*Ex parte Bloxam*, 1860, 33 Beav. 529). As to an application through an agent, see *Ex parte Fraser*, 1871, 24 L. T. 746; *Pugh's case*, 1872, L. R. 13 Eq. 566; and *Coventry's case*, [1891] 1 Ch. 202. Acceptance of an application is ordinarily evidenced by allotment, but it may be evidenced in other ways (*Best's case*, 1865, 2 De G. J. & S. 656; *In re Great Northern Salt Works*, 1890, 44 Ch. D. 483). The shares need not be numbered (*Adams' case*, 1871, L. R. 13 Eq. 483). An acceptance must be unconditional. If it introduces a new term, it is not an acceptance but a new offer (*Duke v. Andrews*, 1849, 2 Ex. Rep. 290; *Pentelov's case*, 1869, L. R. 4 Ch. 179). Notice of the allotment need not be formal (*Richards v. Home Assur. Assoc.*, L. R. 6 C. P. 591); if brought home to the applicant *aliunde* it will bind him (*Wallis' case*, 1868, L. R. 4 Ch. 325, *n.*). When sent by post the contract is complete as soon as the acceptance is put in the post, though it never reaches the applicant, the principle being that the applicant has made the post-office his agent to deliver the offer and receive the acceptance (*Household Fire Insurance v. Grant*, 1879, 4 Ex. D. 215; *Henthorn v. Fraser*, [1892] 2 Ch. 27). A person telegraphing is to be treated as speaking at the place at which the message is to be delivered (*Cowan v. O'Connor*, 1886, 20 Q. B. D. 640). An application may be withdrawn at any time before acceptance is notified to the applicant (*Hebb's case*, 1867, L. R. 4 Eq. 9; and orally, *Truman's claim*, [1894] 3 Ch. 272). Sometimes an application is conditional. When this is the case the question arises whether the condition is a condition precedent or subsequent. *Wood's case*, 1859, 3 De G. & J. 85; *Perrett's case*, 1873, L. R. 15 Eq. 250; *Howard's case*, 1866, L. R. 1 Ch. 561; *Gorriessen's case*, 1873, L. R. 8 Ch. 507, illustrate the former; *Elkington's case*, 1867, L. R. 2 Ch. 511; *Fisher's case*, *Sherington's case*, 1885, 31 Ch. D. 120; *Bridger's case*, 1870, L. R. 5 Ch. 305; *Jackson v. Turquand*, 1869, 39 L. J. Ch. 11; *Barrett's case*, 1865, 2 Drew. & Sm. 415, the latter. An agreement to take paid-up shares cannot be converted on a winding-up into an agreement to take shares not fully paid up (*Anderson's case*, 1877, 7 Ch. D. 95; *In re Addlestone Linoleum Co.*, 1888, 37 Ch. D. 171; *In re Macdonald & Sons*, [1894] 1 Ch. 89).

A complete agreement to take shares does not, however, by itself make the person who has so agreed a member of the company. The full status of membership is not acquired until the allottee's name is entered in the register—except in the case of the signatories of the memorandum (Companies Act, s. 23). See *Contributories*, *infra*, p. 223.

Payment for Shares.—When the Legislature in the Companies Act sanctioned the principle of limited liability, it made it the price of the privilege that the capital should be real, not a sham, and to this end it

required the capital to be paid up in full and no shares issued at a discount (*In re Almada and Tirito's case*, 1888, 38 Ch. D. 415; *In re Addlestone Linoleum Co.*, 1888, 37 Ch. D. 191; *Ooregum Co. v. Roper*, [1892] App. Cas. 125).

But though payment in full was required by the Companies Act, that Act said nothing about the mode of payment, and accordingly a company often accepted from a shareholder payment for shares in kind—an hotel company, for instance, in plate or furniture (*Elkington's case*, 1866, L. R. 2 Ch. 511; *Pellatt's case*, 1866, L. R. 2 Ch. 527). This practice was susceptible of great abuse; it tended to make the capital a sham without any certain criterion of value, and in order to put a stop to it the Legislature in the Companies Act, 1867 (s. 25), provided that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares." If there are cross money payments presently enforceable—if the shareholder owes the company £100 on his shares and the company owes the shareholder £100, it is a useless formality for the shareholder to hand the money over the counter to the company and for the company to hand it back again to the shareholder (*Sparro's case*, 1872, L. R. 8 Ch. 407). This, therefore, is payment in cash (*In re Barrow-in-Furness Investment Co.*, 1880, 14 Ch. D. 403; *In re Carriage Co-operative Supply Association*, 1884, 27 Ch. D. 322; *In re Johannesburg*, [1891] 1 Ch. 129). But a mere agreement by a company to pay a sum of money contemporaneous with an agreement by an intended payee to take shares is not "payment in cash" (*Arnol's case*, 1887, 36 Ch. D. 702), still less is a stipulation for prepayment of shares by set-off of a debt payable in future "payment in cash" (*Kent's case*, 1888, 39 Ch. D. 259).

Registered Agreements.—The alternative which the Legislature offers in lieu of payment in cash is a registered agreement duly made in writing. The conditions of this registered contract are conveniently summarised by Fry, L.J., in *In re New Eberhardt Co., Ex parte Menzies*, 1890, 43 Ch. D. 129. First, there must be, on or before the date of the issue of the shares, a contract (see *Smith v. Brown*, [1896] App. Cas. 614); secondly, that contract must be duly made in writing; and thirdly, that contract must be filed with the registrar. To constitute a contract "duly made in writing" the allottee of the shares must sign as well as the company. A parole acceptance by the allottee is insufficient. The contract need not, however, specify the number of the shares (*Forde's case*, 1885, 33 W. R. 839). The articles of association are not a "contract in writing" within sec. 25 (*Pritchard's case, In re Taverne Mining Co.*, 1872, L. R. 8 Ch. 956). Thus where articles of association duly registered provided that the company should enter into an agreement to purchase a mine in consideration in part of certain fully-paid shares, this was held not a "contract duly made in writing" between the vendor and the company within sec. 25. The effect of such a clause is simply to give the directors authority to make such a contract. The contract to be registered must be with some one external to the company (*Crickmer's case, In re Caribbean Co.*, 1874, L. R. 10 Ch. 614); but the person external to the company need not be a person unconnected with the company—he may be, for instance, a director or promoter (*Anderson's case*, 1877, 7 Ch. D. 105). The contract must also show a consideration for the shares (*Crickmer's case, supra*), and it must be an adequate consideration, that is, the equivalent of cash; for a registered contract under sec. 25 regulates only

the mode of payment; it does not exempt the shares from being paid up in full (*In re Addlestone Linoleum Co.*, 1888, 37 Ch. D. 205; *In re Almada and Tirito Co.*, 1888, 38 Ch. D. 425; *In re Eddystone Marine Insurance Co.*, [1892] 2 Ch. 423). The law may be stated thus: If on the face of the contract it appears that the directors have in the exercise of their discretion accepted the consideration, whatever it be—land, copyrights, a concession, as the equivalent of the cash payable on the shares allotted, the Court will not go into the adequacy of the consideration (*In re Wragg Limited*, [1897] 1 Ch. 796); but if there is anything to impeach the *bona fides* of the transaction, the Court will go behind it and direct an inquiry as to the value of the property comprised in the contract (*Pell's case*, 1869, L. R. 5 Ch. 11). The contract must be registered "on or before" the issue of the shares, be substantially contemporaneous, that is, with the issue of the shares. Where owing to inadvertence it has not been registered in time, the Court has allowed registration *nunc pro tunc* even after winding up (*In re Preservation Syndicate*, [1895] 2 Ch. 768), but it must be satisfied that there are no creditors, or that if there are they consent. As to the sufficiency of filing a sub-contract, see *In re Kharaskhoma Exploring Syndicate*, W. N. 1897, 58. If shares have been duly issued as fully paid under a registered contract, the protection of the contract enures for the benefit of a transferee of the shares issued under it, though the transferee has paid nothing, and has been presented with the shares by the company's vendor. Sometimes this case arises. A company's vendor stipulates to be paid in fully-paid shares, but no contract is registered to make the shares—in law—fully paid. If in such a case the shares have been allotted to the vendor and registered in his name, and he knows it, he will be liable as a contributory; but if he has not acquired the full status of a shareholder, and the contract is still *in fieri*, the Court will not specifically perform it by putting him on the list of contributories (*Ex parte Sandys: In re Railway Time-Tables Publishing Co.*, 1889, 42 Ch. D. 98), because a person who has only agreed to take shares which are fully paid up is not to be compelled to take something quite different (*Arnot's case*, 1887, 36 Ch. D. 702, 711).

Certificates.—A share or stock certificate, as Lord Cairns said in *Shropshire Tramways Co. v. R.*, 1874, L. R. 7 H. L. 509, is a solemn affirmation under the seal of the company, that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate. Share certificates are the proper documentary evidences of a shareholder's title (*Société Generale de Paris v. Walker*, 1886, 11 App. Cas. 29; Companies Act, s. 31), and every shareholder is commonly by the articles (Table A, Art. 2) entitled, on payment of 1s. or other small fee, to a certificate specifying the shares held by him and the amount paid up thereon. The certificate does not itself give a title, but the certificates are the indicia of title which a transferee must have for production to the company before he can get his title perfected by registration (*Colonial Bank v. Whinney*, 1886, 11 App. Cas. 437; *Shropshire Union Ry. Co. v. R.*, *supra*). If the certificates are not forthcoming on a transfer, their non-production puts the transferee on inquiry, and prevents him setting up the title of a buyer for value without notice, for *non constat* the transferor may not have pledged them (*Société Generale de Paris v. Walker*, 1886, 11 App. Cas. 20). By giving a certificate the company arms the transferee with the power of holding himself out to all the world as the owner of the shares, and a *bona fide* buyer from such transferee may therefore under the doctrine of estoppel maintain an action against the company, not as the real owner of the shares, but as a person whom the company is bound to treat as the

real owner (*Simm v. Anglo-American Telegraph Co.*, 1879, 5 Q. B. D. 188; *Tomkinson v. Balkis Consolidated Co.*, [1893] App. Cas. 396). The doctrine of estoppel applies in favour of an original allottee as well as a transferee (*Parbury's case*, [1896] 1 Ch. 100).

A "certification" is a different thing from a certificate (*Bishop v. Balkis Consolidated Co.*, 1890, 25 Q. B. D. 512; *In re Concessions Trust*, [1896] 2 Ch. 757).

Preference Shares.—Preference shares are now an important element in the scheme of company organisation. They constitute an attraction to investors. They are also often the only means which a company, financially water-logged, has of raising fresh capital. The power of a company to create a preference has been a good deal canvassed. A company's memorandum may undoubtedly authorise its giving a preference, and if it does explicitly give priority to a certain class or classes of shareholders, that priority cannot be touched by anything in the articles—the company must reconstruct to get rid of it. But if the memorandum is silent on the subject the articles may then explain it (*Harrison v. Mexican Rwy. Co.*, 1874, L. R. 19 Eq. 358) and confer a priority. Kindersley, V.-C., in *Hutton v. Scarborough Cliff Hotel Co.*, 1862, 2 Drew. & Sm. 514, expressed an opinion that the company could not do so, as it would thereby be altering the constitution of the company, which contemplated equality; but the presumption of equality is one which arises, not from the memorandum of association, but from the general principles of bankruptcy, and it is therefore no violation of the constitution of the company for the articles, in the silence of the memorandum, to give a priority, whether of dividend or capital, or both, to one class of shareholders one over another (*Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361). The usual course is in stating the capital of the company in the memorandum to reserve power to attach to any class of shares any preferential, deferred, qualified, or special rights, privileges, or conditions, and then in the articles to declare what the priorities shall be, a matter peculiarly proper for, the articles—as the contract between the shareholders—to deal with.

Preference shareholders can only claim such preference as may be expressly provided by the memorandum or articles, e.g. as to the dividend being cumulative or not (*Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303). A provision for preferential dividend will give no right to preference in the distribution of surplus capital in the event of a dissolution (*In re London India-rubber Co.*, 1867, L. R. 5 Eq. 519; *Griffith v. Paget*, 1877, 5 Ch. D. 894). Thus where a company was divided into A shareholders with a preferential dividend and B ordinary shareholders, the surplus capital was held distributable among both classes *pro rata* without any preference, though the A shareholders had contributed all the capital and the B shareholders only some worthless patents (*In re London India-rubber Co.*, *supra*). But the memorandum or articles may authorise a preferential payment of capital as well as of dividend (*In re Bangor Slate Co.*, 1875, L. R. 20 Eq. 64). So a power in the articles to increase the capital in such manner and to be issued with and subject to such rules, regulations, privileges, and conditions as the company may think fit, will authorise the issue of new shares with a preference both as regards dividends and in a winding-up (*Harrison v. Mexican Rwy. Co.*, L. R. 19 Eq. 368).

Articles giving shareholders a preference is not a contract by the company to pay a preferential dividend in perpetuity which will prevent the company making an all-round reduction of its capital, though the effect of such a reduction may be to transfer half the preference shareholders' dividend into the pockets of the ordinary shareholders (*Bannatyne v. Direct*

Spanish Cable Co., 1887, 34 Ch. D. 287). The preference shareholders take, subject to the statutory liability to reduction.

Mortgage of Shares.—A legal mortgage of shares may be made by transfer of the shares into the name of the mortgagee, and if the shares are fully paid this is the best course, but if the shares have a liability attaching to them the mortgagee runs the risk of having calls made upon him, and if the company is wound up, of being placed on the list of contributories. *Bloomenthal v. Ford*, [1897] App. Cas. 156, is an instance. Accordingly it is a common thing for the mortgagor-shareholder to deposit the certificates by way of equitable mortgage, accompanied by blank transfers. By doing so the mortgagor impliedly authorises the mortgagee to fill up the blank and get himself registered as the owner of the shares whenever he desires to realise the security (*In re Talviti Cotton Co.*, 1874, L. R. 17 Eq. 273). But blank transfers so filled up will only pass the legal interest in the shares where an instrument in writing is by the articles sufficient to transfer the shares (*In re Tees Bottle Co.*, 1876, 35 L. T. 834). If a deed is requisite it will pass only an equitable interest, because a transfer executed in blank is not valid as a deed (*Hibblewhite v. M^r Morine*, 1840, 6 Mee. & W. 200).

An equitable mortgagee of shares can only fill up the blank for the purpose of giving effect to the contract in his own favour, or reborrowing to the extent of his loan. He cannot delegate the authority to fill up to a stranger for purposes foreign to or in fraud of that contract (*France v. Clark*, 1884, 26 Ch. D. 263; *Williams v. Colonial Bank*, 1888, 38 Ch. D. 388). An equitable mortgagee of shares, however, to whom the mortgagor has executed transfers in blank, has an implied authority to sell (*In re Kimberley North Block Diamond Co.*, 1888, 59 L. T. 579). A company may accept notice from an equitable mortgagee of shares of his interest, such notice not being notice of a trust (*Bradford Banking Co. v. Briggs*, 1887, 12 App. Cas. 29).

Shares are choses in action within the exemption of sec. 44 (iii.) of the Bankruptcy Act, and a shareholder therefore who has made an equitable mortgage of his shares is not by reason of the shares standing in his name at the date of his bankruptcy reputed owner of the shares so as to make them pass to his trustee in bankruptcy (*Colonial Bank v. Whinney*, 1886, 11 App. Cas. 426).

Difficult questions of priorities sometimes arise between unregistered transfers and equitable titles. In *Rook v. Williamson*, 1888, 38 Ch. D. 485, the principle laid down by Stirling, J., was that a merely inchoate title by an unregistered transfer is not equivalent for the purpose of defeating a pre-existing equitable title to a legal estate in the shares. The title by transfer is to be deemed inchoate only—if not until a complete legal title is acquired, at all events unless and until all necessary conditions have been fulfilled to give the transferee, as between himself and the company, a present, absolute, and unconditional right to have the transfer registered before the company was informed of the existence of a better title.

An equitable mortgage is chargeable with a stamp duty of one shilling for every £100 (Stamp Act, 1891, First Sched. Mortgage (3)).

Founders' Shares.—Founders' shares originated with private companies. Thence they came to be frequently adopted by trading companies that were not private, being found convenient (1) as a consideration for getting the company's capital underwritten or other costs of promotion, and (2) as a bonus to applicants for shares, one founders' share for, say, twenty ordinary shares subscribed. Founders' shares usually entitle the holders to half or one-third of the company's profits after payment of 7 or 10 per

cent to the ordinary shareholders; sometimes also to half the surplus assets on a winding-up. Such shares are now much less common than they were.

Calls.—To make a call there must in the first place be properly appointed directors (*Garden Gully Quartz Mining Co. v. McLister*, 1875, 1 App. Cas. 46; *Faure Electric Co. v. Phillipart*, 1888, 58 L. T. 525), and if the directors act by a quorum a sufficient quorum (*Austin's case*, 1871, 24 L. T. 932). The articles generally regulate calls, and directors can only therefore make calls at such times, after such notices and of such amounts as are prescribed in the articles (*In re Pyle Works*, 1889, 44 Ch. D. 583). Directors are, moreover, trustees of the call-making power, and must exercise it in the interests of the shareholders, and not for their own ends (*Gilbert's case*, 1870, L. R. 5 Ch. 559); but if they are acting *bona fide* the Court will not interfere with their discretion (*Odesa Tramways Co. v. Mendel*, 1878, 8 Ch. D. 235). It is of the essence of a call that it should fix the time and place for payment (*In re Cawley & Co.*, 1889, 42 Ch. D. 236), because when a person takes a share in a company he thereby contracts with the company to pay the full amount of the share, but only to pay when and if the directors call for it to be paid up (*In re Kershaw*, 1890, 45 Ch. D. 320). A call will not therefore date from the resolution authorising the call under Art. 5 of Table A, unless the resolution fixes time and place. Shares may be forfeited for non-payment of calls, but the forfeiture does not under an article, in the form of Art. 21 of Table A, prevent the shareholder being liable to pay all calls owing at the date of forfeiture. Interest may be charged on overdue calls (Table A, Art. 6; and see *Stocken's case*, 1869, L. R. 3 Ch. 412; *In re Welsh Flannel Tweed Co.*, 1875, L. R. 20 Eq. 360). In an action for a call, the production of the register with the alleged shareholder's name in it is *prima facie* evidence of his being a shareholder (*West Cornwall Ry. Co. v. Mowatt*, 1850, 15 Q. B. 521). Repudiation within a reasonable time is a good defence (*Glamorganshire Iron Co. v. Irvine*, 1866, 15 L. T. 52). A shareholder's bankruptcy in France is no defence to an action against him for calls in England (*Faure Electric Light Co. v. Phillipart*, 1889, 58 L. T. 528). After a liquidator is appointed, he and not the directors is the proper person to exercise the power of calling up the uncalled capital (*In re Pyle Works*, *supra*; *In re London Metallurgical Co.*, 32 L. J. N. 279).

Transfer of Shares.—Shares are property, and every shareholder has therefore a right *prima facie* to transfer them (*In re Cawley & Co.*, 1889, 42 Ch. D. 209, 231)—indeed, as Lord Blackburn said in *In re Bahia and San Francisco Ry. Co.*, 1868, L. R. 3 Q. B. 595, the great object when joint-stock companies were established was that the shares should be capable of being easily transferred. A director has the same right as an ordinary shareholder to transfer his shares (*Jessopp's case*, 1859, 2 De G. & J. 649; *Gilbert's case*, 1869, L. R. 5 Ch. 559; as to his qualification shares, *quære*, *In re South London Fish Market Co.*, 1888, 39 Ch. D. 331). A voluntary winding-up being in contemplation will not prevent shareholders, though cognisant of the fact, transferring their shares (*In re Taurine Co.*, 1883, 25 Ch. D. 118).

There is no obligation imposed on a transferor of shares of seeing that a transferee is a proper person, but if he does not get a proper person as transferee—if he transfers, for instance, to an infant—he runs the risk of having the shares thrown back on him (*Parsons & Spong's case*, 1868, L. R. 8 Eq. 656). For a person once a shareholder remains a shareholder until he executes a valid transfer or his shares are duly forfeited (*Heritage's case*, L. R. 1869, 9 Eq. 5). A buyer of shares impliedly agrees to indemnify the seller—to place himself exactly in the same position (for better or worse) as

between himself and the company as that in which the seller stood (*Mayhew's case*, 1854, 3 De G., M. & G. 848). If therefore he requires, as he may do, the seller to transfer to a nominee of his, the transfer which the buyer procures to be executed to such nominee must be such as completely to relieve the transferor from all future liability (*Maxted v. Paine* (No. 2), L. R. 6 Ex. 151). After the agreement for sale the registered owner is a trustee for the buyer of any benefit accruing, such as a dividend or an option to take new shares (*Black v. Homersham*, 1878, 4 Ex. D. 241; *Stewart v. Lupton*, W. N. 1874, 171, 178).

Certificates.—A seller of shares is bound, if the contract fixes no date, to deliver the certificates within a reasonable time (*De Weal v. Adler*, 1886, 12 App. Cas. 141). The absence of certificates on a transfer puts the transferee on inquiry (*Société Generale de Paris v. Walker*, 1886, 11 App. Cas. 20).

Bank Shares—Numbers.—On a sale of bank shares the numbers of the shares must be specified (Leeman's Act, 1867; *Perry v. Barnett*, 1884, 15 Q. B. D. 388).

One of two executors is not competent to transfer shares or stock registered in the name of both (*Barton v. North Staffordshire Rwy. Co.*, 1888, 38 Ch. D. 458).

Cornering Seller.—A person who contracts to sell shares before allotment and finds himself cornered, i.e. unable to obtain the shares in the market to deliver except at an extortionate price, has no civil remedy against the persons who have cornered him (*Salaman v. Turner*, 1891, 64 L. T. 598).

Form of Transfer.—If a company's regulations prescribe a particular course for a shareholder ceasing to be a shareholder, he can only cease to be a shareholder by pursuing that course (*Bargate v. Shortridge*, 1851, 3 H. L. 312). The form of the transfer—whether by deed or not—depends on the regulations of the company (*Société Generale de Paris v. Tramways Union Co.*, 1884, 14 Q. B. D. 451). If the regulations are silent, the rule as to the form of transfers may be interpreted by the practice of the company (*Marino's case*, 1867, L. R. 2 Ch. 596). Shares in a company domiciled abroad, e.g. in the United States, can only be transferred by an instrument effectual by the law of the United States for that purpose (*Colonial Bank v. Cady*, 1890, 15 App. Cas. 281).

A transfer of shares executed by the transferor as a deed, but leaving the name of the transferee blank, is void as a deed (*Hibblewhite v. M'Morine*, 1840, 6 Mee. & W. 200), but it may be good as an agreement (*In re Barned Banking Co.*, 1867, L. R. 3 Ch. 105).

A transfer is usually required by the articles to be executed by both transferor and transferee (Table A, Art. 8; *Marino's case*, *supra*), but the transferee not executing is a mere irregularity (*In re Taurine Co.*, 1883, 25 Ch. D. 133). As to the application of Stock Exchange rules to transfers, see *Coles v. Bristowe*, 1868, L. R. 4 Ch. 3; *Grissell v. Bristowe*, 1868, L. R. 4 C. P. 43; *Maxted v. Paine* (No. 2), 1870, L. R. 6 Ex. 132; *Perry v. Barnett*, 1884, 15 Q. B. D. 388).

Out and Out Transfers.—If a transfer be real, i.e. a transfer out and out of all the transferor's interest, it will be upheld, although it be made to a mere pauper, and for the avowed purpose of relieving the transferor from any future liability (*R. v. Lambourne Valley Rwy. Co.*, 1889, 22 Q. B. D. 466). It is the fault of the regulations of the company if they admit of persons becoming shareholders who are of no means (*King's case*, 1871, 40 L. J. Ch. 366). Most companies' articles consequently contain a power for the directors to veto transfers. This power is only available while the

company is a going one (*In re City of Glasgow Bank*, 1879, 4 App. Cas. 573). Like other powers of directors, it is a fiduciary one (*In re Gresham Life Insurance Society*, 1872, L. R. 8 Ch. 449), not to be arbitrarily or capriciously exercised (*In re Bell Brothers*, 1891, 65 L. T. 245), for so exercised it might mean confiscation. The directors' duty is fairly to consider the fitness of the proposed transferee at a board meeting (*In re Ceylon Land and Produce Co.*, 1893, 7 T. L. R. 692). If the power to reject a transfer is limited to shares not fully paid up, this points to a pecuniary responsibility of the transferee as the principal element to be regarded by the board. Directors cannot under a power veto a transfer because they disapprove of the purpose for which it is made, e.g. to multiply votes, if there is no objection to the transferee (*Moffatt v. Farquhar*, 1877, 7 Ch. D. 605; *Pender v. Lushington*, 1877, 6 Ch. D. 70). It seems doubtful whether directors of a banking company could properly refuse to approve a transfer to a nominee of a rival bank (*Robinson v. Chartered Bank*, 1865, L. R. 1 Eq. 32). A director may approve a transfer to himself (*Burke's case*, 1870, L. R. 6 Ch. 262).

If the directors have fairly considered the question at a meeting, and there is no evidence to show that they have acted corruptly or capriciously, the Court will not interfere with their discretion (*In re Gresham Life Assur. Society, Ex parte Penny*, 1872, L. R. 8 Ch. 446). But where there was evidence that the chairman and others of the directors had been actuated by feelings of hostility to the transferor, the Court overruled the rejection (*In re Ceylon Land and Produce Co., supra*). The directors are not bound either out of Court or in Court to give their reasons for disapproving the transfer, and their not doing so will, therefore, not make the Court draw unfavourable inferences against them; but if they choose to give their reasons, the Court will consider whether they are legitimate or not (*In re Bell Brothers, supra*).

On a sale of shares according to the custom of the Stock Exchange (making the price payable on the seller handing over a duly-executed transfer and the certificate), there is no implied guarantee by the seller that the directors shall accept the buyer as a transferee, and that if they do not accept him the price shall be refunded (*London Founders' Assoc. v. Clarke*, 1888, 20 Q. B. D. 576; *In re Cannock and Rugby Colliery Co., Ex parte Harrison*, 1885, 28 Ch. D. 363). He takes the risk. A power is also given to refuse registration of a transfer where calls on the shares are unpaid. As to this *Hubbersty v. Manchester G. and L. Ry. Co.*, 1867, L. R. 2 Q. B. 471; *Watson v. Eales*, 1857, 23 Beav. 294; and *In re Hogley Ry. Co.*, 1874, L. R. 9 Ch. 257, may be consulted. Where in such a case the shareholder whose calls were in arrear had induced the company to postpone making a call, and immediately transferred his shares, the Court refused on equitable principles to order the company at the instance of the transferor to register the transferee (*Ex parte Parker, In re National and P. M. Insur. Co.*, 1867, L. R. 2 Ch. 685). Indebtedness to the company, not only for calls, but in any way whatever, as for money advanced, is another ground on which the company may—if its articles so provide (*Pinkett v. Wright*, 1842, 2 Hare, 120)—refuse registration of a transfer (*Ex parte Stringer*, 1882, 9 Q. B. D. 436).

Misdescription of the transferee is another ground on which the directors may veto a transfer (*Payne's case*, 1869, L. R. 9 Eq. 223; *Williams' case*, L. R. 1869, 9 Eq. 225, *n.*; *Rogers' case*, 1872, 25 L. T. 406), and for a very good reason, that it prevents the directors exercising any real judgment. Direct approval of a transfer may be inferred (*In re Branksea Island Co., Ex*

parte Bentinck (No. 2), 1889, 1 Meg. 23; *Nicol's case*, *In re Royal British Bank*, 3 De G. & J. 433).

If directors think the pendency of a winding-up petition a ground for not allowing any transfer, they should pass a resolution to allow no more transfers (*Lowe's case*, 1869, L. R. 9 Eq. 595; *Shipman's case*, 1867, L. R. 5 Eq. 219). Shares may be transferred, after a voluntary winding-up, with the sanction of the liquidator (Companies Act, s. 131; *In re National Bank of Wales*, [1897] 1 Ch. 298).

Forged Transfers.—A forged transfer of stock or shares does not affect the title of the stockholder to the stock and the dividends on it (*Davis v. Bank of England*, 1836, 2 Bing. 393; *Waterhouse v. L. and S.-W. Ry. Co.*, 1879, 41 L. T. 553), and the true owner of the stock or shares is entitled to require the company to recognise him as still being the holder of the stock or shares purported to be transferred (*Sloman v. Bank of England*, 1845, 14 Sim. 475), and to have the alleged transfer and registration cancelled (*Johnston v. Kenton*, 1870, L. R. 9 Eq. 181). Thus, where a trustee of Bank of England stock had forged his co-trustee's name to a power of attorney, and sold the stock and absconded with the proceeds, the bank was ordered to re-invest the stock in the name of the innocent trustee. The trustee has a right in such a case to say to the bank, "You must make the account stand as it ought to stand without regard to the unauthorised transfer" (*Sloman v. Bank of England*, *supra*; *Taylor v. Midland Ry. Co.*, 1860, 28 Beav. 287; *Barton v. North Staffordshire Ry. Co.*, 1889, 38 Ch. D. 458). Companies commonly protect themselves against forged transfers by sending a notice to the registered shareholder informing him that a transfer has been presented for registration, but a shareholders disregarding such a notice from the company will not estop him, if the transfer is a forgery, from compelling the company to restore his name to the register (*Barton v. L. and N.-W. Ry. Co.*, 1889, 24 Q. B. D. 77). Suppose, however, that a person innocently brings a forged transfer to the company, and that the company registers it, does it by so registering impliedly guarantee the genuineness of the transfer to the bringer? The answer is No! The company owes no duty to the bringer to make inquiries whether the transfer is genuine or not; the company is not precluded from saying to him, to use Lord Bramwell's words, "You brought us a forged transfer, we believed it to be genuine, and we have registered you as a stockholder; but we are not estopped from saying that the transfer was forged and that you have no real title" (*Simm v. Anglo-American Telegraph Co.*, 1879, 5 Q. B. D. 214; *Waterhouse v. L. and S.-W. Ry. Co.*, 1879, 41 L. T. 553). But if a company registers a person claiming under a forged transfer and issues him a certificate, it thereby enables him to hold himself out as the true owner, and a *bonâ fide* buyer from him may therefore, under the doctrine of estoppel, maintain an action against the company, not as the real owner of the stock, but as a person whom the company is bound to treat as the real owner (*Simm v. Anglo-American Telegraph Co.*, *supra*; *In re Bahia and San Francisco Ry. Co.*, 1868, L. R. 3 Q. B. 584). The measure of damages in an action against the company, based on such estoppel for misrepresentation of title, is the market value of good shares at the date when the buyer was deprived, by the intervention of the true owner, of the shares which he was led to believe were his.

The Forged Transfers Acts, 1891 and 1892, now give power to a company to make compensation by a cash payment out of the company's funds for any loss arising from a transfer of any shares or stock in pursuance of a forged transfer, or of a transfer under a forged power of attorney, and the

company may, by a small fee, by insurance, reservation of capital, accumulation of dividends, or in any other manner it may resolve upon, form such compensation fund. The company may also borrow for the purpose on the security of its property. It may impose reasonable restrictions on the transfers of shares and powers of attorney to transfer. The company is to be surrogated to any rights of the payee of the compensation.

Lien of Company.—A power for a company to refuse a transfer by a shareholder indebted to it gives the company no lien or charge on the shares (*In re Dunlop*, 1882, 21 Ch. D. 583); but it is not uncommon, for a company's articles to give the company a "first and permanent lien" upon the share of every shareholder for all debts due from him to the company. When a company with such a lien receives notice of a charge on the shares, it cannot set up its lien against the person entitled to the charge in respect of a debt subsequently accruing due from the shareholder to the company (*Bradford Banking Co. v. Briggs*, 1886, 12 App. Cas. 29). A power given to directors to refuse transfers by a shareholder indebted to the company, means indebted at the time when a transfer by the shareholder is lodged for registration with the proper officer (*In re Cawley & Co.*, 1889, 42 Ch. D. 209; and see *New London and B. Bank v. Brocklehurst*, 1882, 21 Ch. D. 302).

Register.—Every company under the Companies Act is required under a penalty to keep a register of its members, and to enter in such register—(1) the names, addresses, and occupations of such members, the number of shares held, and the amount paid up thereon; (2) the date of every member's entry on the register; (3) the date at which any person ceased to be a member (Companies Act, s. 25). The register is *prima facie* evidence of the truth of the matters required to be entered in it. This is an exceptional privilege, and therefore the prescribed mode of keeping the register must be strictly complied with (*Bain v. Whitchurch*, 1850, 3 H. L. 1). In an action for a call, it is sufficient to produce the register with the defendant's name in it as a shareholder, and it is then for him to rebut the evidence (*West Cornwall Ry. Co. v. Mowatt*, 1850, 15 Q. B. 521). The register is the only evidence of the right to vote (*Pender v. Lushington*, 1877, 6 Ch. D. 70). The register is required by sec. 32 of the Companies Act to be open to the inspection of any member gratis, and of any other person on payment of a shilling. This provision opening the register to the inspection of all the world is part of the policy of the Legislature in conceding limited liability. It is to enable persons dealing with the company to know to whom and to what they have to trust (*Oakes v. Turquand*, 1867, L. R. 2 H. L. 367). The right to inspect carries with it the right to take copies (*Mutter v. Eastern and Midland Ry. Co.*, 1888, 38 Ch. D. 92). A shareholder cannot be refused inspection because he is using his right in the interests of a rival company (*ibid.*). The register being then the authentic evidence of the constituency of the company, it is very important that it should truly represent that constituency, that is, should contain the names of the persons, and only of the persons, who are from time to time the real shareholders, and for this purpose the Legislature has in sec. 35 of the Companies Act supplied a summary mode of rectifying the register. This section provides that "where the name of any person is without sufficient cause entered in or omitted from the register of members of any company under the Act, or if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member, the person or member aggrieved or any member of the company" may apply to the Court for an order for rectification. It has

been decided, after some fluctuation of judicial opinion, that the Court has *jurisdiction* under this section to make a summary order for rectification in all cases that it may think fit, whether as between the company and a shareholder, or between two disputant shareholders *inter se* (*Ex parte Shaw*, 1887, 2 Q. B. D. 463); but the jurisdiction is a discretionary one, and there are cases in which it is not desirable that the jurisdiction should be exercised, where, for instance, there are complicated questions of law or fact in dispute, and the proper remedy is by action for specific performance. The Court will not try by this summary machinery what is in effect an action by a shareholder for rescission, for instance, on the ground of misrepresentation in the prospectus, involving, as such an action may do, the necessity of examining and cross-examining witnesses (*In re Ruby Consolidated Mining Co.*, 1874, 43 L. J. Ch. 633).

The Court may rectify the register though a winding-up order has been made (*Reese River Silver Mining Co. v. Smith*, 1869, L. R. 4 H. L. 64). A company is by the Companies Act, 1880, empowered to keep a colonial as well as a home register.

Dividends.—Dividends mean *prima facie* a share of profits, and in accordance with this the company's articles commonly provide that no dividend shall be payable except out of profits arising from the business of the company—indeed, payment out of capital is *ultra vires* the company. What are profits available for dividend is one of the problems of political economy. "Profits" were defined in *Mersey Docks v. Lucas*, 1882, 8 App. Cas. 903, as "the incomings of a concern after deducting the expenses of earning them"; and see *Glasier v. Rolls*, 1889, 42 Ch. D. 453. For the purpose of ascertaining profits there is sometimes adopted what is known as the "single account system," a balance-sheet including by reference a profit and loss account (*Palmer, Co. Pre.*, 6th ed. 418; *Lubbock v. British Bank of South America*, [1892] 2 Ch. 198; *Verney v. General Commercial Co.*, [1894] 2 Ch. 239); sometimes the double account system, that is, a separate account of capital and revenue (*Buckley, Companies*, 7th ed., 554). It may be a good thing for a trading company to know how its capital account stands, but it is not necessary for purposes of dividend. The Courts have repeatedly held that there is no obligation on a company to make up lost capital before paying dividends (*Lee v. Neuchatel Asphalte Co.*, 1889, 41 Ch. D. 1). The rationale of it is that the capital of the company is invested in property of various kinds, which is liable to fluctuations in value. It may depreciate. It may be lost. It is embarked in a commercial venture, and must run the risks of it. A submarine telegraph company, for instance, may lose one of its cables, or a steamship company one of its liners, and yet be doing a flourishing business, which justifies the directors in paying a dividend; and to say that it must not pay any dividend until it has made good the lost asset would paralyse trade. So if the property depreciates in value from external causes,—for instance, land owing to agricultural depression,—such a loss need not be made good; but a company cannot pay dividend without providing for repairs and depreciation of plant occasioned by user in the ordinary course of the company's business—a tram company, for instance, must keep its line in proper working condition (*Dent v. London Tramway Co.*, 1880, 16 Ch. D. 384); *Davison v. Gillies*, 1880, 16 Ch. D. 347). A rise in the value of the company's property cannot conversely be discounted as dividend (*Salisbury v. Metropolitan Ry. Co.*, 1870, 22 L. T. 839). In *Lee v. Neuchatel Asphalte Co.*, 1889, 41 Ch. D. 1, the Court of Appeal have, however, gone further, and held that where the company's capital is invested in a

wasting property, such as a quarry or a patent, the company may, if its memorandum contemplates its doing so, distribute the whole of the profits derived from the working, without setting apart any of it to form a sinking fund to replace the waste. A company is under no obligation—this seems the principle of the decision—to carry on the business in perpetuity; but the so-called profits in such a case are profits only in a conventional sense, agreed that is between the shareholders as such, not profits in the ordinary commercial sense, and it is very difficult to see why they do not constitute a return of capital to the shareholders.

Guarantee of Dividends.—Dividends are sometimes guaranteed for three or four years by the vendor of the company. In such a case, when the company is wound up before the expiration of the guarantee, the question arises, Was the guarantee fund meant by the contract to form part of the property of the company, or was it a trust fund appropriated for the benefit of the shareholders? The answer to this is given in *In re South Llanhauar Colliery Co.*, 1879, 12 Ch. D. 509; *Stuart's Trust*, 1877, 4 Ch. D. 213, and *Richardson v. English Crown Spelter Co.*, W. N., 1885, 31.

Income-tax.—As to income-tax payable by companies, see *Colquhoun v. Brook*, 1889, 14 App. Cas. 493; *Erichsen v. Last*, 1881, 8 Q. B. D. 414, and *Spiller v. Turner*, [1897] 1 Ch. 911.

Paying a dividend is an act of the shareholders, not of the directors (*In re Denham & Co.*, 1884, 25 Ch. D. 763), but it is done on the recommendation of the directors. As a rule, the Court will not interfere with directors in the matter of dividends, unless they are doing something *ultra vires* the company (*Lerer v. Land Securities Co.*, 1894, W. N. 21; *Ex parte Kemp*, 1894, W. N. 142; *Lee v. Neuchatel Asphalte Co.*, 1889, 41 Ch. D. 1; *Rance's case*, 1870, L. R. 6 Ch. 104; *Lambert v. Neuchatel Asphalte Co.*, 1882, 30 W. R. 413), as paying dividends out of capital. Sometimes a larger amount is paid on some shares than others. *Prima facie* where this is the case the company has no power to pay a dividend in proportion to the amounts respectively paid up, but the company may take such a power by its articles as originally framed, or as altered by special resolution (*Oakbank Oil Co. v. Crum*, 1882, 8 App. Cas. 65), and it commonly does (Table A., Art. 72).

Forfeiture of Shares.—A company, though it cannot cancel shares, may forfeit them, the distinction being that forfeited shares may be reissued (*Marshall v. Glamorgan Iron Co.*, 1869, L. R. 7 Eq. 136).

Forfeiture is an act *strictissimi juris*, and parties seeking to enforce it must exactly pursue all that is necessary to enable them to exercise such a strong power (*Clarke v. Hart*, 1858, 6 H. L. 65; *Johnson v. Lytle's Iron Agency*, 1877, 5 Ch. D. 687). If the forfeiture, for instance, is for non-payment of a call, and the call was irregularly made by a board of directors not duly elected (*Garden Gully United Quartz Mining Co. v. McLister*, 1876, 1 App. Cas. 39), or the notice of forfeiture is too short, the forfeiture will be bad. The power must be exercised for the benefit of the company and not to relieve the shareholder from liability (*Richmond's case*, 1858, 4 Kay & J. 325; and see *Aaron's Reefs Limited v. Twiss*, [1896] App. Cas. 273).

Meetings.—The policy of the Legislature throughout the Companies Acts is that the shareholders should manage their own affairs, and the machinery for obtaining this "domestic forum," as it has been termed, is a general meeting of shareholders. An appeal to a general meeting is the proper and only remedy of shareholders who complain of mismanagement (*Isle of Wight Ry. Co. v. Tahourdin*, 1884, 25 Ch. D. 333). Such a general meeting is by sec. 49 of the Companies Act, 1862, to be held once at least

in every year, and the first—or as it is commonly called the statutory general meeting—must be held within four months after registration of the memorandum (Companies Act, 1867, s. 39). The model set of articles, known as Table A, provides for one general meeting of shareholders in February in each year, unless otherwise prescribed by the company in general meeting. This is the ordinary general meeting, but in addition to this the directors may, whenever they think fit, convene an extraordinary general meeting, and they are bound to do so upon a requisition made in writing by one-fifth of the members of the company. If the directors on being duly requisitioned fail for twenty-one days to convene a meeting, the requisitioners may convene it (Table A, Arts. 32–34; *Macdougall v. Gardiner*, 1874, L. R. 10 Ch. 606), and the intention of the Act is in accordance with the policy of company self-government that the shareholders should do so—use the remedy which they have in their own hands—instead of resorting to the Court (*Isle of Wight Ry. Co. v. Tahourdin*, *supra*).

The notice of meeting prescribed by the Companies Act, 1862, s. 52, is a seven days' notice in writing, which by Table A, Art. 35, may be sent by prepaid letter to the shareholder's registered address (*In re London and Mediterranean Bank*, 1868, 37 L. J. Ch. 537). The section only applies to shareholders who can be reached by ordinary English post, not to shareholders in America, for instance (*In re Union Hill Silver Co.*, 1875, 22 L. T. 400). It need not be in the precise terms of the Companies Act, 1862, s. 52, or of the company's regulations. It is enough if the regulations are substantially complied with (*In re British Sugar Refining Co.*, 1857, 3 Kay & J. 408), the true canon of construction in a commercial notice being, "What is the fair business-like meaning which business men in the position of shareholders would put on the document when they received it?" (per Bowen, L.J., *Alexander v. Simpson*, 1889, 43 Ch. D. 147). But it is not enough in calling an extraordinary meeting to say "special business" (*Wills v. Murray*, 1850, 4 Ex. Rep. 869), or on a notice of a confirmatory meeting to send a newspaper containing a marked report of the first meeting (*Alexander v. Simpson*, 1889, 43 Ch. D. 143); nor is a notice that a meeting will be held in a certain contingency good (*ibid.*). Apart from forms, a notice of meeting may be bad by reason of its emanating from a board of directors irregularly constituted. If this is the case—if the board summoning the meeting is composed of persons some of whom are not legally directors—it makes the general meeting irregular, and vitiates all the resolutions passed at it (*Harben v. Phillips*, 1883, 23 Ch. D. 14). But a mere irregularity in summoning the board of directors which convenes the meeting—a director, for instance, receiving only a few minutes' notice of the board meeting—will not invalidate the proceedings at the general meeting (*Brown v. Le Trinidad*, 1887, 37 Ch. D. 1); nor will the Court interfere by injunction, for such short notice is a mere irregularity which the persons who have committed it can at once set right by calling a fresh meeting with all due formality, and it is a fixed and salutary rule of the Court, as Lindley, L.J., said in the latter case, not to interfere for the purpose of forcing companies to conduct their business according to strict rules.

By Table A, Art. 39, the chairman of the board of directors is to preside; failing him, or if he is late, the members are to choose one of their own number to be chairman (Art. 40, Companies Act, s. 52). The chairman of a general meeting has *prima facie* authority to regulate all the details of proceedings (not provided for by the articles), and to decide all incidental questions which arise at such meeting and require prompt

ruling. If his decision is quarrelled with, a majority of those present must decide (*In re Indian Zoedone Co.*, 1884, 26 Ch. D. 70; *Wandsworth Gas Light Co. v. Wright*, 1870, 22 L. T. 404). But a chairman cannot dissolve a meeting before it has finished the business for which it was convened (*National Dwellings Society v. Sykes*, [1894] 3 Ch. 159). To constitute a valid meeting there must be a proper quorum (*In re Cambrian Coal Co.*, 1875, 23 W. R. 405). A quorum for a general meeting may be fixed by reference to the holding of capital, say a minimum of 10 persons holding no less than $\frac{1}{10}$ th of the capital of the company, or by number as in Table A, Art. 37, thus: If the numbers of the company are under 10, 5; one for every 5 additional members over 10 up to 50, and one for every 10 additional members after 50. One shareholder cannot hold a meeting (*Sharp v. Davies*, 1886, 2 Q. B. D. 26; *In re Sanitary Carbon Co.*, W. N., 1877, 223).

Minutes of Meetings.—It is the duty of directors to keep accurate minutes of what takes place at its general meetings (*Law's case, In re British Provident Assurance Society*, 1862, 1 De G., J. & S. 509), and these minutes, if purporting to be signed by the chairman, are evidence in all legal proceedings (Companies Act, s. 67; *Southampton Dock Co. v. Richards*, 1839-40, 1 Man. & G. 448).

Resolutions.—Resolutions by a general meeting are of three kinds—(1) ordinary, (2) special, (3) extraordinary. Where a company's regulations provide that certain acts shall be done by the company in general meeting, such as borrowing money, declaring a dividend, or appointing directors, an ordinary resolution passed by a majority of members present is sufficient (*North-West Transportation Co. v. Beatty*, 1887, 12 App. Cas. 589); but there are other acts vital to the interests of the company which require a fuller representation of the constituency of the company and a more mature deliberation, and for these a special resolution or an extraordinary resolution is often required. Where, for instance, a company is proposing to alter its memorandum of association (under the Companies Memorandum of Association Act, 1890), and embark in a new business, or to alter its articles generally (Companies Act, s. 50), or sell its undertaking and assets under sec. 161 of the Companies Act, or reduce its capital (Companies Act, 1867, s. 9), or wind up (Companies Act, s. 129 (2)), a special resolution is required.

Special Resolution.—A special resolution is a resolution passed by not less than three-fourths of the members present, in person or by proxy (where proxies are allowed), at a general meeting of which notice specifying the intention to propose such resolution has been duly given and confirmed by a similar majority at a meeting held not less than fourteen days after the date of the first meeting (Companies Act, s. 51; *In re Railway Sleepers Supply Co.*, 1885, 29 Ch. D. 204; *In re Miller's Dale Lime Co.*, 1886, 31 Ch. D. 211).

Extraordinary Resolution.—A resolution is extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution (Companies Act, s. 129).

A copy of any special resolution must be registered with the Registrar of Joint-Stock Companies (Companies Act, s. 53). A declaration by the chairman of a meeting that a resolution has been carried, and an entry to that effect in the books of the company, is sufficient evidence of the fact (Table A, Art. 42; *In re Brynmawr Coal and Iron Co.*, W. N. 1877, 45; *In re Indian Zoedone Co.*, 1884, 26 Ch. D. 70).

Voting.—Voting depends on the articles, but, in default of any provisions therein, every member is, by the Companies Act, s. 52, to have one vote. Sometimes a scale is adopted. Preference shareholders, again, are

often given no vote, and a vendor's vote on his shares may be restricted. *Prima facie* a majority of the shareholders duly convened upon any question with which the company is legally competent to deal is binding on the minority, and consequently on the company (*North-West Transportation Co. v. Beatty*, 1887, 12 App. Cas. 589). A majority at a meeting (where no poll is demanded) is ascertained by counting hands, according to the common law rule (*In re Horbury Bridge Co.*, 1879, 11 Ch. D. 109). Proxies, it has now been definitely decided, cannot be counted on a show of hands (*Ernest v. Loma Gold Mines Ltd.*, [1897] 1 Ch. 1). The register is the only evidence by which the right of members to vote at a general meeting can be ascertained: the question of beneficial ownership cannot be entered into (*Pender v. Lushington*, 1877, 6 Ch. D. 70). A shareholder may transfer some of his shares to nominees to increase his voting power (*ibid.*), for a shareholder's vote is a right of property which he may use as he pleases: even to promote, for instance, his private interest against the interests of the company (*North-West Transportation Co. v. Beatty*, 1887, 12 App. Cas. 589).

Poll.—A right to a poll is by common law incident to any election at a public meeting by show of hands (*Campbell v. Maund*, 1836, 5 Ad. & E. 865). It is usually an appeal to the whole constituency of the company, as distinguished from the members present at the meeting (*R. v. Wimbledon Local Board*, 1882, 8 Q. B. D. 459), and made demandable by five members (Companies Act, s. 51, Table A, Art. 43; *In re Phoenix Electric Co.*, 1883, 31 W. R. 398).

Reduction of Capital.—The Companies Act permitted a company to increase its capital by the issue of new shares, to consolidate its capital, and to convert paid-up shares into stock, but it permitted no reduction of a company's capital. The capital—the subscribed capital that is—was to be paid up in full, and it was to be inviolable. That was the price of the privilege of limited liability (*In re Alexandra Palace Co.*, 1882, 21 Ch. D. 160), and it was a sound and salutary principle, nor has the Legislature in anywise departed from it. It has, it is true, in the Companies Acts, 1867, 1877, and 1880, sanctioned the reduction by a company of its capital, called up as well as uncalled in certain cases, but in conceding this privilege it has fenced it round with so many safeguards, so much caution, that no injustice can by any means be done. A company desirous of giving itself power to reduce its capital must first pass and confirm a resolution giving the power, and then pass and confirm a resolution reducing the capital. It cannot do both simultaneously (*In re Patent Invest. Sugar Co.*, 1885, 31 Ch. D. 166; *In re West India and Pacific Steamship Co.*, 1873, L. R. 9 Ch. 11, *n.*). It must also, after passing the resolution for reduction, add to its name the words, "and reduced," for so long as the Court may fix—usually a month from the date of the resolution. It then presents its petition for the confirmation of the Court (*In re Leicester Mortgage Co.*, 1894, W. N. 108, 116).

There are various modes of reducing capital. It may be reduced by the return of accumulated profits (Companies Act, 1888, ss. 3, 4), or by cancelling capital before prospectus issued (*In re West African Co.*, 1886, 34 W. R. 411), or by cancelling shares bought by the company out of accumulated profits (*In re York Glass Co.*, 1889, 37 W. R. 471), or by cancelling one class of shares (*In re Floating Dock Co. of St. Thomas*, [1895] 1 Ch. 691), preference shares (*In re Decido Pier Co.*, [1891] 2 Ch. 354), or founders' shares (*In re London and New York Investment Co.*, [1895] 2 Ch. 860; and see *British and American Trustee Corporation v. Couper*, [1894] App. Cas. 399; *In re Wallesey Brick Co.*, W. N. 1894, 20); but the most common case is where

the reduction is made for the purpose of writing off lost capital. Where a trading company has lost a portion of its capital nothing can be more beneficial to the company than to admit that loss—to write it off, and, if it chooses to go on trading, to trade with the diminished capital which remains, the dividend being declared on the capital actually remaining (*In re Ebbw Vale Iron and Coal Co.*, 1877, 4 Ch. D. 831); where, for instance, a marine telegraph has lost one of its cables (*Bannatyne v. Direct Spanish Telegraph Co.*, 1886, 34 Ch. D. 303), but is still doing a profitable business.

In such a case where the proposed reduction does not, in the words of the Companies Act, 1877, s. 4, "involve either the diminution of any liability in respect of uncalled capital, or the payment to any shareholder of any paid-up capital," the creditors are not entitled to object, for the sufficient reason that they are not hurt, and the Court may also dispense with the use of the words "and reduced," and with advertisement of the petition (*In re Tambracherry Estates Co.*, 1885, 29 Ch. D. 683). But if the reduction is not of that kind, and does involve a return of capital to the shareholders, or diminution of any liability in respect of paid-up capital, the Court has to see that creditors are properly protected (*In re Lamson Store Service Co.* [1895] 2 Ch. 726), and for this purpose a statutory machinery is provided (see General Order, 1868). Shortly put, this is, that after the presentation of the petition, the Court is to settle a list of creditors of the company, to be certified by the chief clerk, such certificate showing which of the creditors have consented in writing, and which have had their debts discharged or secured. Any creditor on the list who has not consented or been provided for may then appear and oppose. The Court is also bound to consider the interests not only of dissentient creditors, but of dissentient shareholders (*Bannatyne v. Direct Spanish Telegraph Co.*, 1886, 34 Ch. D. 287).

There is nothing in the Acts of 1867 or 1877 requiring a reduction of capital to be a rateable all-round reduction (*In re Barrow Hamatite Steel Co.*, 1888, 39 Ch. D. 582; *In re Gatling Gun Co.*, 1889, 38 W. R. 317; *In re Agricultural Hotel Co.*, 1890, 39 W. R. 218; *In re American Pastoral Co.*, 1891, 62 L. T. 625). A company that has lost capital may, for instance, reduce by writing off the loss from the ordinary and not the preference shares (*In re Quebrada Copper Co.*, 1889, 40 Ch. D. 363), or from the ordinary shares, and not from the unissued and preference shares. But if there is a bargain by the company with the preference shareholders, which would be broken by the reduction of capital, the preference shareholders would be entitled to an injunction; and see *In re Barrow Hamatite Steel Co.*, 1888, 39 Ch. D. 582. A reduction may be sanctioned though the voting powers are affected (*In re Colmer*, [1897] 1 Ch. 524).

Companies Limited by Guarantee.—The other class of limited companies sanctioned by the Companies Act are companies limited by guarantee. They may or may not have a capital divided into shares, but they seldom, in fact, have a capital so divided. There are two special features belonging to a guarantee company. One is the guarantee contained in the memorandum, by which each member agrees in the event of winding up to contribute a certain amount to the assets. No minimum amount is fixed by the Act for the guarantee. It may be anything from 1s. to £10,000; but if the company wishes to get credit, the guarantee must be a substantial one. The other special feature of a company limited by guarantee is, that the shares of the members, or proportions of their interests, are of no nominal value in money. This gives a superior elasticity to this form of company, which, we have it on the authority of the draughtsman of the Act—Lord Thring—was what was intended. A company limited by guarantee can therefore

hold property without putting any particular value on it, or the shares of the members in it. It simply belongs to the members in certain fractional amounts. This renders the guarantee form convenient for clubs and associations not requiring a capital or the interests of the members to be expressed in cash terms. It is also convenient for syndicates which buy to re-sell, and in many ways also for the ordinary trading company.

A company limited by guarantee is not embarrassed, for instance, as a company limited by shares is, by the restrictions in the Companies Act as to issuing shares at a discount, reducing its capital, or cancelling shares. A company limited by guarantee is also exempt from the *ad valorem* duty chargeable on a company limited by shares. To get these advantages together with those of a company limited by shares, the expedient has been tried of registering a company as one limited by guarantee, and then passing and registering a special resolution, altering the articles so as to make them correspond. The Registrar of Joint-Stock Companies at one time took exception to this course, but, since North, J.'s, decision in *Malleison v. General Mineral Patent Syndicate*, [1894] 3 Ch. 538, raises no objection to registration.

Domicile of Companies.—The domicile of a trading company as that of an independent legal person is quite distinct from the domicile of the persons who compose it (*Calcutta Jute Co. v. Nicholson*, 1876, L. R. 1 Ex. D. 428). It is its principal place of business, that is, the place where the administrative business of the corporation is carried on (Dicey, *Conf. L.* 154). This is not necessarily the place where the company's manufacturing or other business operations are carried on; nor is it necessarily the place of the registered office of the company. A foreign company can contract to have a domicile for the purpose of being sued, within the jurisdiction (*Société Industrielle des Méhauz v. Huelva*, W. N. 1889, 32). Conventions have been entered into by this country with Germany, France, Belgium, Italy, Spain, Greece, and other foreign countries, mutually securing to commercial and industrial companies the exercise of their rights and the right of appearing before tribunals.

Foreign Companies.—A foreign corporation carrying on business in this country through a branch office resides in England, and is liable to be sued in the same manner as an English corporation aggregate (*Haggen v. Comptoir D'Escompte de Paris*, [1893] 23 Q. B. D. 519). On the same principle a foreign or colonial company carrying on business in England through a branch office may be ordered to be wound up in England, but the winding up here will only be ancillary if the company is also being wound up abroad (*In re Matheson Brothers*, 1884, 27 Ch. D. 225; *In re Commercial Bank of South Australia*, 1886, 33 Ch. D. 174).

Actions by and against Companies.—Where there is a corporate body capable of bringing an action for itself to recover property, either from its directors or officers, or from any other person, or otherwise enforce its rights, the corporate body is the proper plaintiff (*Gray v. Lewis*, 1872, L. R. 8 Ch. 1050). The only exception is where the corporate body has got into the hands of directors and of the majority, and such directors or majority are using their power for the purpose of doing something fraudulent against the minority, who are overborne by them (*ibid.*, and see *Macdougall v. Gardiner*, 1875, 1 Ch. D. 13; *Menier v. Hooper's Telegraph Works*, 1874, L. R. 9 Ch. 350; *Pender v. Lushington*, 1877, 6 Ch. D. 70). As to discovery by a company (*Anderson v. Bank of British Columbia*, 1875, 2 Ch. D. 657; *Southwark Water Co. v. Quick*, 1878, 3 Q. B. D. 315).

Borrowing Powers of a Company.—A company cannot borrow unless the power to do so is conferred by its Act or charter, either expressly or impliedly, as incident to the purposes for which the company was incorporated (*Baron Wenlock v. River Dee Commrs.*, 1885, 10 App. Cas. 359). In the case of a trading company borrowing to a reasonable amount is incident to carrying on of the company's business (*General Auction Estate Co. v. Smith*, [1891] 3 Ch. 432); and this includes power to make an equitable mortgage by deposit (*In re Patent File Co.*, 1870, L. R. 6 Ch. 83). If the company's power to borrow is, on the face of its constitution, limited, a person dealing with such company must inquire or run the risk (*Chapleo v. Brunswick Building Society*, 1881, 6 Q. B. D. 715). If it proves that the borrowing is *ultra vires*, the lender has no remedy against the company; but he may have a personal remedy against the directors if they have warranted their authority (*Firbank v. Humphreys*, 1886, 18 Q. B. D. 154). He may also have another remedy, that is, of being surrogated to the rights of creditors of the company who have been paid out of the borrowed moneys (*Blackburn Building Society v. Cunliffe, Brooks, & Co.*, 1882, 22 Ch. D. 617; *Neath Building Society v. Luce*, 1889, 43 Ch. D. 158). A trading company authorised to borrow may do so, in any manner it finds most convenient, by bills of exchange or common bonds, or bill of sale, or debentures, or debenture stock. The two latter are the most usual, and will be treated of under DEBENTURES.

Contracts by Companies.—A company formed under the Companies Act can only enter into contracts which are within the company's powers as defined by its constitution, its memorandum and articles of association (*Ernest v. Nicholls*, 1857, 6 H. L. 420). Every one shareholder or stranger must be taken to deal with the company on these terms, that is, with notice of its constitution (*Royal British Bank v. Turquand*, 1857, 6 El. & Bl. 332; *Marshall v. Glamorganshire Banking Co.*, 1868, L. R. 7 Eq. 137). But he is not fixed with notice of private by-laws passed by the directors (*Royal Bank of India's case*, 1869, L. R. 4 Ch. 252), or bound to see that every formality prescribed by the articles has been strictly performed. He is entitled to assume that all things have been done regularly if he has no notice of irregularity (*In re County Life Assurance Co.*, 1870, L. R. 5 Ch. 288; *Howard v. Patent Ivory Co.*, 1888, 38 Ch. D. 156). The Companies Act, 1867, s. 37, provides in what form a company may contract. Shortly, contracts, which if between private persons would have to be in writing and under seal, must be under the company's seal. Contracts, which if between private persons would have to be in writing and signed, may be, in case of a company, signed by an authorised agent of the company (*Beer v. London and Paris Hotel Co.*, 1875, L. R. 20 Eq. 412). A trading company's contracts made in the ordinary course of its business need not be under seal (*South of Ireland Colliery Co. v. Wadell*, 1869, L. R. 4 C. P. 617; Companies Act, 1867, s. 37 (3)).

Pre-incorporation Contracts.—A company is not bound by a contract made on its behalf before it is incorporated; nor can it ratify such a contract (*Kelner v. Baxter*, 1866, L. R. 2 C. P. 174; *In re Northumberland Avenue Hotel Co.*, 1886, 33 Ch. D. 16); but it may adopt it (*Boston Deep Sea Fishing Co. v. Aysell*, 1888, 39 Ch. D. 339).

Winding Up.—Winding up is not necessarily a breach of a contract entered into by a company, for the liquidator may elect to carry out the contract (*In re Trent and Humber Co.*, 1868, L. R. 6 Eq. 396; *In re Phoenix Bessemer Steel Co.*, 1876, 4 Ch. D. 108).

Reconstructions.—Reconstructions are frequently resorted to now as a

means of extricating a company from difficulties, financial or legal. The most common case is where a company's capital is all paid up and it requires more to go on. In such a case it obtains it by transferring its assets to a new company, the shares in which are allotted to the members of the old company, say £1 shares credited by the 15s. paid up. The uncalled 5s. thus forms a fund for working capital; or the company may desire to carry on a business outside its memorandum, and not attainable under the powers of the Companies (Memorandum of Association) Act, 1890. Sometimes a reconstruction is the only way of getting rid of onerous preference shares. Reconstructions fall, broadly speaking, into two classes: (1) Reconstructions under the Joint-Stock Companies Arrangement Act, 1870, and (2) reconstructions by sale and transfer of a company's assets, either under sec. 161 of the Companies Act, or under a power in the company's memorandum. An amalgamation is not a "reconstruction" (*Hooper v. Western Counties*, 1892, 41 W. R. 86). What a scheme of arrangement with creditors is to an individual, an arrangement under the Joint-Stock Companies Arrangement Act, 1870, is to a company pressed by creditors. The Court may, in such a case—to put it shortly—sanction any compromise or arrangement between a company in winding up, and the creditors of the company, or any class of them, if such arrangement is agreed to at a meeting of a three-fourths majority in value of such creditors or class of creditors. The intention of the Legislature in the Act was that, in the winding up of companies the Court should be in a position to bind everybody to what the Court thinks is a beneficial compromise to creditors, liquidators, and shareholders (*Nicholl v. Eberhardt Co.*, 1888, 59 L. T. 863). Under the Act it is competent for classes of creditors to compromise with one another, as well as with the company (*Dominion of Canada Freehold Estate Co.*, 1886, 55 L. T. 347). To obtain the approval of the Court, the scheme must be a proper one, that is, it must be made in good faith, and be fair and reasonable (*In re Empire Mining Co.*, 1890, 44 Ch. D. 402; *In re Alabama Ry. Co.*, [1891] 1 Ch. 239). It is the duty of the Court to see, for instance, that the majority are acting *bona fide*, and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent. It is also its duty to see that the resolution has been passed *bona fide* in the interests of the creditors, and not by debenture-holders, who are also shareholders, to escape liability as shareholders (*In re Wedgewood Coal and Iron Co.*, 1877, 6 Ch. D. 627). The meeting should adequately represent the entire body of creditors or class of creditors. It is for the chief clerk (now Master) to see that due notice is given (*In re Alabama Ry. Co.*, *supra*). The majority of three-fourths in value is a majority present at the meeting, not a majority of all the creditors of the company (*In re Bessemer Steel and Ordnance Co.*, 1875, 1 Ch. D. 251). The liquidator is the proper person to preside (*Slater v. Darlaston Steel and Iron Co.*, W. N., 1887, 139). Debenture-holders in voting must produce their debentures if they pass by delivery (*In re Wedgewood Coal and Iron Co.*, 1877, 6 Ch. D. 627; and see *In re Madras Irrigation Co.*, W. N. 1881, 120). In case of proxies, the office proxy form should be followed (W. N. 1896, 56 (2)). The Court may not only sanction a reconstruction scheme, under which unsecured creditors are to be allotted fully paid-up shares in the new company to the amount of their debts, but compel dissident debenture-holders to surrender their securities and accept in lieu of them fully-paid shares (*In re Empire Mining Co.*, 1890, 44 Ch. D. 402; *In re Alabama Ry. Co.*, [1891] 1 Ch. 213). Examples of schemes may be found in *Dominion of Canada Freehold Estate Co.*, 1888, 58 L. T. 347; *In re Dynevor Collieries Co.*, 1878, 11 Ch. D. 605; *In re Western*

of *Canada Oil Co.*, W. N. 1874, 148; *In re Bessemer Steel and Ordnance Co.*, 1875, 1 Ch. D. 251; *In re Akankoo Gold Coast Mining Co.*, 1890, 1 Meg. 43. The Court will not sanction a scheme under the Act which provides for the payment of costs or the remuneration of persons whose assistance is required to carry out the scheme, unless express provision is made for bringing in the costs and remuneration for taxation or allowance by the Court (*In re Mortgage Insurance Corporation*, 1896, W. N. 4 (3); and see W. N. 1894, 166).

Sale and Transfer of Assets.—Under the method of reconstruction by sale and transfer of assets, the liquidators of a company in voluntary winding up may, with the sanction of a special resolution of the company, receive in compensation or part compensation for the transfer or sale of the assets to another company shares, policies, or other like interests of the transferee company in lieu of cash for distribution among members of the company in winding up (Companies Act, s. 161). Any dissentient member may require the liquidators to purchase his interest, the price to be determined by arbitration (s. 162).

The meaning of sec. 161, which applies to a winding up under supervision as well as a purely voluntary winding up (*In re Imperial Mercantile Credit Assoc.*, 1871, L. R. 12 Eq. 514), is that the company in voluntary winding up instead of disposing of its assets for money may dispose of them for shares in any other company or policies or any like interest or future profits or other benefit from the purchasing company, but whatever the benefit is—in whatever shape taken—it is to be given or paid or handed over to the liquidators for the benefit of the contributories of the company wound up, subject to the payment of their debts (*Griffith v. Payet*, 1877, 5 Ch. D. 898). The sale under sec. 161 must be a sale to another company, or to an agent for a company to be formed (*In re Hester & Co.*, 1875, 44 L. J. Ch. 757) not an individual (*Bird v. Bird's Patent Sewage Co.*, 1874, L. R. 9 Ch. 358), but it may be to a foreign company (*In re Irrigation Co. of France*; *Ex parte Fox*, 1871, 40 L. J. Ch. 439). It may also be only of a part of the business (*In re City and County Investment Co.*, 1879, 13 Ch. D. 481). The agreement for sale providing for payment of a bonus out of the purchase money to the directors of the old company will not vitiate the agreement (*Southall v. British Mutual Life Assurance Society*, 1871, L. R. 6 Ch. 69). The section does not contemplate the subjecting of the shareholders in the selling company without their unanimous consent to a fresh and original liability, such as guaranteeing the sufficiency of the transferred assets (*Clinch v. Financial Corp.*, 1868, L. R. 4 Ch. 121), or paying a premium on the shares they are to receive to be carried to the reserve fund of the transferee company (*Imperial Bank of China v. Bank of Hindustan*, 1868, L. R. 6 Eq. 91); but the shares in the new company not being fully paid up does not make the agreement *ultra vires* (*Nicholl v. Eberhardt*, 1888, 59 L. T. 862). The general meeting can only decide on the nature of the consideration, not on the mode of its distribution, e.g. as between preference and ordinary shareholders (*Griffith v. Payet*, 1877, 5 Ch. D. 894). Shares in the new company given to the shareholders as consideration for the transfer are not assets of the old company, and cannot be reached by a creditor in an action against the company (*Cardiff Preserved Coal Co. v. Norton*, 1867, L. R. 2 Ch. 409).

A shareholder, on a proposed sale and transfer under sec. 161, has three courses open to him—(1) he may assent to the resolution; (2) he may do nothing; (3) he may dissent within seven days and be paid cash for his shares (*Los' case*, 1868, 11 Jur. N. S. 661). If he contemplates accepting

the option of shares in the new company he must act promptly (*Postlethwaite v. Port Philip Gold Co.*, 1889, 43 Ch. D. 452), especially if the company's property is of changing value (*Zuccani v. Nacupai Gold Mining Co.*, 1889, 61 L. T. 176, and see *Weston v. New Guston Co.*, 1889, 62 L. T. 275).

When a shareholder gives notice of dissent he must in the same notice require the liquidator to purchase his shares (*In re Union Bank of Kingston-on-Hull*, 1880, 13 Ch. D. 808). The liquidator can then buy off his opposition (*De Rosaz v. Anglo-Italian Bank*, 1868, L. R. 4 Q. B. 474). If a dissentient shareholder refuses to accept the valuation put upon his interest by the liquidator, his interest must be settled by arbitration under sec. 162 (*In re Imperial Mercantile Credit Association*, 1871, L. R. 12 Eq. 504). The interest—at 4 per cent.—is payable from demand not award (*In re United States Cable Co.*, 1879, 48 L. J. Ch. 665). It may be asked how creditors of the company are protected. The answer is that they can, if unpaid, at any time within a year, get a winding-up order, and the resolution for sale and transfer will then be invalidated (*In re Callao Bis Co.*, 1889, 42 Ch. D. 169; *Vining's case*, 1870, L. R. 6 Ch. 96).

Power of Sale of Undertaking in Memorandum.—A power to sell the company's undertaking for such consideration as the company may think fit, and, in particular, for shares, debentures, or securities of any other company, is often now inserted in a company's memorandum, and has this advantage that under it a reconstruction can be carried through without a winding up. See as to such a power, *Cotton v. Imperial Co.*, [1892] 3 Ch. 454; *Grant v. United Switchback Rwy.*, 1889, 40 Ch. D. 135; *In re New Zealand Co. v. Peacock*, [1894] 1 Q. B. 622).

Winding up by the Court.—A company once incorporated under the Companies Acts cannot be put an end to except through the machinery of a winding up (*Princess of Reuss v. Bos*, 1871, L. R. 5 H. L. 193). Winding up is of two kinds—(1) winding up by the Court, (2) winding up by the shareholders themselves, either purely voluntary or under the supervision of the Court. The Companies Acts contemplate *prima facie* a voluntary winding up, and 90 per cent. of the liquidating companies are so wound up; but there are still a large number of cases in which creditors and contributories of a company—creditors especially—are entitled to invoke the assistance of the Court to administer the company's estate and affairs. The statutory machinery for this purpose is now of a very complex and elaborate kind, closely assimilated to that of bankruptcy. It is set in motion by a petition, which is a substitute for a suit for winding up a partnership (*In re Bradford Navigation Co.*, 1892, 41 L. J. Ch. 340; *In re New Zealand Banking Co.*, 1867, L. R. 4 Eq. 226). But first a word must be said as to what companies may be wound up.

Companies which may be wound up.—Any company registered under the Act and not dissolved (*Coxon v. Gorst*, 1891, 64 L. T. 444) may be wound up, and it makes no difference that the sphere of the company's operations is out of England (*In re Madrid and Valencia Rwy. Co.*, 1849, 3 De G. & Sm. 127), or its members all foreigners (*In re General Company for Promotion of Land Credit*, 1870, L. R. 5 Ch. 363); but besides these the Act provides for the winding up of unregistered companies, *i.e.* companies not registered under the Companies Act, 1862 (Companies Act, s. 199; *In re London India-rubber Co.*, 1865, L. R. 1 Ch. 329). Railway companies incorporated by Act of Parliament are excepted from the jurisdiction. Under this section (s. 199), the Court has made orders for winding up canal and dock and water companies, chartered companies, friendly societies, illegal associations,

building societies, foreign companies with a branch office in England, mutual marine insurance companies, tram companies, savings banks, and many other associations. A trade union cannot, however, be wound up, or a club (*In re St. James' Club*, 1852, 2 De G., M. & G. 383), or a foreign company with only an agent in England. The machinery for winding up an unregistered company is analogous to that for a registered company *mutatis mutandis* (see Companies Act, ss. 200-204).

The Court.—The Courts having jurisdiction in winding up are the High Court (the jurisdiction of which is now vested in Mr. Justice Vaughan Williams), the Chancery Courts of Lancaster and Durham, and the County Courts, with some exceptions (Companies Winding-up Act, 1890, s. 1). The jurisdiction of the Stannaries Court is now transferred to the local County Courts. Where the paid-up capital of a company exceeds £10,000, the petition for winding up must be presented to the High Court, or if the company is within their jurisdiction to the Chancery Courts of Lancaster or Durham; if the paid-up capital is less than £10,000, to the County Court within whose jurisdiction the registered office of the company is situate. The Metropolitan County Courts are excluded from winding up as from bankruptcy jurisdiction. Their jurisdiction is vested in the High Court (*In re Court Bureau*, W. N. 1891, 15). A winding-up petition must be in one of the forms given in the appendix to the Winding-up Rules made under the Companies Winding-up Act, 1890, Forms Nos. 12 and 13. The petition must allege facts which justify a winding-up order, otherwise it will be demurrable (*In re Wear Engine Works*, 1874, L. R. 10 Ch. 188). It is not enough to allege that it is just and equitable that the company should be wound up (*In re Riva Gold Washing Co.*, 1878, 11 Ch. D. 41). A petition to the High Court for winding up is presented, after being impressed with a £2 companies' winding-up stamp, at the office of the registrar (Room 66 of the Bankruptcy Buildings), and the registrar appoints a time and place at which the petition is to be heard, and at the same time gives out to the petitioner or his solicitor a memorandum. This memorandum relates to the various formalities to be observed by the petitioner—the advertisement of the petition, the statutory affidavit verifying it, and the service of the petition; and before the petition will be placed in the paper the petitioner or his solicitor must attend before the registrar and satisfy him that these formalities have been complied with, and that the petition is “in order” before it comes before the Court (Winding-up Rules, April 1892, r. 18). If a petition is presented *malà fide*, and is an abuse of the Court's process, the Court has an inherent jurisdiction to restrain advertisement (*Ex parte Advance Boiler Co.*, [1894] 2 Ch. 349); so where a petition is presented to obtain payment of a debt *bond fide* disputed, the Court will restrain it (*Cercle Restaurant Castiglione Co. v. Lavery*, 1880, 18 Ch. D. 555; *Cauliz Waterworks Co. v. Barnett*, 1874, L. R. 19 Eq. 182). The presentation of a winding-up petition against a company without reasonable or probable cause is a ground of action without any proof of special damage resulting therefrom (*Quartz Hill Consolidated Gold Mining Co. v. Eyre* (No. 2), 1884, 50 L. T. 274).

Creditors or contributories who wish to appear on the hearing of a petition must now give notice of their intention to do so to the petitioner at the address given in the advertisement, before 6 o'clock p.m. on the day preceding the hearing, and must state whether they mean to support or oppose (Winding-up Rules, April 1892, r. 20). This salutary rule is meant to prevent the parties who appear waiting to take sides till they see whether the petitioner is going to win or not, so as to secure their costs.

The petitioner makes out a list of the names and addresses of those who have given notice, and a fair copy is handed into Court on the hearing; if no notice of appearance has been received, it should be so stated (*In re Australian Alkaline*, 1891, 36 Sol. J. 139; *Lucigen Light Co.*, 1891, 36 Sol. J. 540). A creditor or contributory appearing without having given notice of intention to appear is not to be heard, and is never allowed any costs. A second petition can only be properly presented where the second petitioner has good reason to believe the first to be collusive (*In re Norton Iron Co.*, 1877, 47 L. J. Ch. 91; *In re Scott & Jackson*, W. N. 1893, 184; *In re Standard Cement Co.*, W. N. 1890, 91; *Sheringham Development Co.*, W. N. 1893, 5). A winding-up petition may be presented by the company itself, by a creditor, by a contributory (Companies Act, s. 82), and also now by the Official Receiver (Companies Winding-up Act, 1890, s. 14). The object of a creditor's petition, which is by far the most common kind of petition, is to get paid. A creditor's petition, as Jessel, M. R. said in *In re St. Thomas Dock Co.*, 1876, 2 Ch. D. 118, ought to be presented with no other object. The assignee of a debt may petition (*In re Paris Skating Rink*, 1877, 5 Ch. D. 962); so may the executor of a creditor (*In re Masonic General Life Assurance Society*, 1886, 32 Ch. D. 372); or a debenture-holder whose interest is in arrear may petition. A secured creditor may present a winding-up petition (*Moor v. Anglo-Italian Bank*, 1879, 10 Ch. D. 681; *Olathe Silver Mining Co.*, 1884, 27 Ch. D. 278; *In re Chapel House Colliery*, 1883, 24 Ch. D. 259; *Central Railway Company of Monte Video*, 1879, 11 Ch. D. 372). If the debt is *bona fide* disputed, a winding-up petition is not a legitimate mode of enforcing payment, and will be dismissed with costs. This is a well-settled rule (*In re Gold Hill Mines*, 1883, 23 Ch. D. 214; *Niger Merchants v. Capper*, 1880, 18 Ch. D. 557; *In re Imperial Guardian Life Assurance Society*, 1869, L. R. 9 Eq. 447). Non-payment of a disputed debt is not proof of insolvency (*In re Wheal Lovell Mining Co.*, 1849, 1 Mac. & G. 1). Sometimes in such a case the Court directs the petition to stand over, with leave to bring an action (*Bowes v. Hope Mutual Insurance Co.*, 1866, 11 H. L. 389; *In re New York Exchange Co.*, 1887, 58 L. T. 915).

An equitable debt will support a petition (*In re National Permanent Benefit Building Society*, 1869, L. R. 5 Ch. 312). If a bare trustee of a debt petitions he must join the beneficial owner of the debt (*In re Ooregum Gold Mining Co.*, 1885, 29 Sol. J. 204).

A contributory who petitions must be either an original allottee, or the shares must have been held by him and registered in his name for at least six months, during the eighteen months previously to the commencement of the winding up, or they must have devolved upon him through the death of a former holder (Companies Act, 1867, s. 40). This is to prevent shares being transferred to anybody, the nominee, perhaps, of a rival in trade, to qualify him to present a petition. As to "held," see *In re Wala Wynaad Indian Gold Mining Co.*, 1882, 21 Ch. D. 849. A bankrupt shareholder cannot present a petition, for he is not a contributory, though his trustee is (*ibid.*). A shareholder being in arrear with calls will not prevent the Court making a winding-up order (*In re Diamond Fuel Co.*, 1879, 13 Ch. D. 406). A fully-paid shareholder is still a contributory, and as such may present a winding-up petition (*In re National Savings Bank Association*, 1865, L. R. 1 Ch. 547). But as a fully paid up shareholder is under no further liability, he must satisfy the Court, before it will make an order, that there will be a substantial surplus divisible among the shareholders (*In re Rica Gold Washing Co.*, 1879, 11 Ch. D. 36; *In re Vron Colliery Co.*, 30 W. R. 388), of actual or at least probable assets (*In re Lancashire Brick*

and *Tile Co.*, 1865, 34 Beav. 330; *In re Diamond Fuel Co.*, 1879, 13 Ch. D. 408; see, however, *In re Rica Gold Washing Co.*, 1879, 11 Ch. D. 36).

Mismanagement is not a ground for a shareholder presenting a petition. He should get the directors to call a meeting (*In re Professional Benefit Building Society*, 1871, L. R. 6 Ch. 862); nor is the fact that the shareholder has been induced to take the shares by fraud or misrepresentation. His right remedy is rescission (*In re Union Hill Silver Co.*, 1870, 22 L. T. 402).

A petitioner may, by leave of the Court, withdraw his petition, but it is a common thing now, when leave to withdraw is asked, to adjourn the petition, with liberty to any creditor or contributory to take up the petition under Winding-up Rules (r. 2, March 1893; *In re Invieta Works*, W. N. 1894, 39). This is to prevent collusion. A withdrawing petitioner must pay the costs of all parties, because by advertising the petition he has invited creditors and contributories to appear (*In re Nacqui Gold Mining Co.*, 1885, 28 Ch. D. 65). Whether it is a creditor or contributory who is petitioning, he must bring his case within the statutory jurisdiction. This jurisdiction—the circumstances under which a company may be wound up by the Court—have been carefully defined by the Legislature (Companies Act, s. 79). They are as follows:—“(1) Whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (4) whenever the company is unable to pay the debt; (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up.” It is only in these cases that an order for winding up by the Court can be made (*In re Langham Skating Rink Co.*, 1877, 5 Ch. D. 683; *In re Irrigation Co. of France*, 1871, 40 L. J. Ch. 435). If the facts in a winding-up petition do not bring the company within one of these five cases, the Court will not take upon itself, under sec. 79 (5), to determine whether it is for the interest of the shareholders generally that the company should be wound up; that must be settled by a domestic tribunal of the shareholders, *i.e.* a statutory majority of three-fourths, under sec. 129 (2). All the clauses have undergone a microscopic scrutiny by the Court. The first calls for no comment. The shareholders themselves invite the intervention of the Court. As to the second, non-commencement of business is only meant to be one test of whether the company is in such a state that it ought to be wound up (*In re Metropolitan Railway Warehousing Co.*, 1867, 15 W. R. 1121; and see *In re Capital Fire Insur. Assoc.*, 21 Ch. D. 209). The Court will not make a winding-up order on the ground of suspension, unless satisfied that there has been an intention on the part of the company to abandon its business, or an inability to carry it on (*In re Tomlin Patent Horse Shoe Co.*, 1886, 55 L. T. 314; *In re Middlesborough Assembly Rooms Co.*, 1880, 14 Ch. D. 104). An abandonment of one object is not an abandonment of all (*In re Norwegian Titanic Iron Co.*, 1865, 35 Beav. 223; *In re Patent Bread Machinery Co.*, 1866, 14 W. R. 787). The third clause—reduction to less than seven members—is illustrated in *In re South London Fishmarket Co.*, 1888, 39 Ch. D. 324. The fourth clause, “whenever the company is unable to pay its debts,” is much the commonest ground for winding up. Here the Legislature has not left it to the Court to ascertain insolvency, but has furnished in sec. 80 (4) a test. A company is to be deemed unable to pay its debts whenever—to put it shortly—a creditor for £50 has served a demand for payment, and the company has neglected for three weeks (*In re Catholic*

Publishing Co., 1864, 2 De G., J. & S. 116) to pay or compound the debt. The Court is bound to treat such "neglect" to comply with the statutory demand as conclusive evidence of the company's insolvency (*In re Imperial Hydropathic Hotel Co.*, 1882, 49 L. T. 160). But debt means debt absolutely due (*In re European Life Assur. Society*, 1869, 39 L. J. Ch. 324; *In re Bristol Joint-Stock Bank*, 1890, 44 Ch. D. 703). Mere omission need not be "neglect" if there is reasonable cause (*In re London and Paris Banking Corp.*, 1874, L. R. 19 Eq. 444), as the debt being disputed (*In re Wheal Lovell Mining Co.*, 1849, 1 Mac. & G. 1). The statutory test in sec. 80 (1) is not the only one, sec. 80 (4). As to the solvency of an insurance company, see *In re European Life Assur. Society*, 1869, L. R. 9 Eq. 122. The last state of things is where it is in the opinion of the Court "just and equitable" that the company should be wound up. At an early period it was held—unfortunately as Lindley, L.J., recently said—that "just and equitable" in (5) must be confined to cases *ejusdem generis* with those before enumerated (*In re Wear Engine Works Co.*, 1874, L. R. 10 Ch. 191; *In re Anglo-Greek Steam Co.*, 1866, L. R. 2 Eq. 6; but see now *In re Sailing Ship "Kentmere" Co.*, W. N. 1897, 58). If the company is a "bubble," for instance (*In re Anglo-Greek Steam Co.*, *supra*; *In re London and County Coal Co.*, 1866, L. R. 3 Eq. 355), it may be wound up, or if the substratum of the company is gone (*In re Suburban Hotel Co.*, 1867, L. R. 2 Ch. 750); if, for instance, the company is formed to work a particular gold mine, and the mine has been sold (*In re Haven Gold Mining Co.*, 1882, 20 Ch. D. 51; *In re Red Rock Gold Mining Co.*, 1889, 61 L. T. 785); or to work a patent for making coffee out of dates, and the patent cannot be obtained (*In re German Date Coffee Co.*, 1881, 20 Ch. D. 169); or to buy land which is not discoverable on the map (*In re Nylestrom*, 1889, 61 L. T. 785); or a concession to lay a sub-marine cable, which is found to be void (*In re International Cable Co.*, 1890, 2 Meg. 183; see also *In re Crown Bank*, 1890, 44 Ch. D. 634); or a complete deadlock as to the company's affairs (*In re Sailing Ship "Kentmere" Co.*, W. N. 1897, 58). In these and other similar cases the impossibility of carrying out the principal object of the company makes a winding-up order just and equitable, and the fact that a majority of shareholders want to go on will not prevent the Court making the order in a shareholder's petition (*In re Bristol Joint-Stock Bank*, 1890, 44 Ch. D. 703). But the company being a losing concern (*In re Suburban Hotel Co.*, 1867, L. R. 2 Ch. 745; *In re Factage Parisien*, 1865, 13 W. R. 214), or the directors being guilty of misconduct (*In re Anglo-Greek Steam Co.*, 1866, L. R. 2 Eq. 1; *In re Professional Benefit Building Society*, 1870, L. R. 6 Ch. 862), or the shareholders few and the assets small (*In re Second Commercial Benefit Building Society*, 1879, 48 L. J. Ch. 753; *In re Natal Co.*, L. R. 3 Ch. 355), does not make it "just and equitable" that the company should be wound up. If there is a probability of a surplus, the Court will have regard to the wishes of the shareholders, rather than the creditors (*In re Chillington Iron Co.*, 1885, 29 Ch. D. 159). The latest case on the subject is *In re Brinsmead & Co.*, [1897] 1 Ch. 406. When a petitioning creditor's debt is established, a winding-up order is, speaking generally, *ex debito justitiæ* (*Bowes v. Hope Mutual Life Insur. Society*, 1865, 11 H. L. 402; *In re Western of Canada Oil Co.*, 1874, L. R. 17 Eq. 1; *In re Chapel House Colliery Co.*, 1883, 24 Ch. D. 259), but not as against the wishes of a majority of creditors (*In re Great Western (Forest of Dean) Coal Consumers Co.*, 1882, 21 Ch. D. 773; *In re Uruguay Central Rwy. Co. of Monto Video*, 1879, 11 Ch. D. 372). For the Court is bound, under the Companies Act, s. 91, to have regard to the wishes

of the creditors generally (*In re Western of Canada Oil Co.*, 1873, L. R. 17 Eq. 5; *In re West Hartlepool Iron Works Co.*, 1875, L. R. 10 Ch. 618). In *In re Krasnapolsky*, [1892] 3 Ch. 174, Vaughan Williams, J., was of opinion that the disciplinary policy of the Companies (Winding-up) Act, 1890, had modified the earlier principles of winding up, and that investigation being required into the origin or management of a company was a sufficient ground for winding up. The point has never come before the Court of Appeal. There is this further qualification of the *prima facie* right to a winding-up order, that the Court is not bound to set the winding-up machinery in motion if there are no assets, or such as there are will be exhausted by the debentures (*In re St. Thomas Dock Co.*, 1866, 2 Ch. D. 119; *In re Great Western (Forest of Dean)*, *supra*; *In re Chapel House Colliery Co.*, 1883, 24 Ch. D. 259), and winding up cannot therefore accomplish the purpose for which the machinery was invented by the Legislature (*In re Fraternity of Free Fishermen of Faversham*, 1887, 36 Ch. D. 339). But the onus is on the company, not the petitioner, to prove the futility of the order (*In re Fraternity of Free Fishermen of Faversham*, *supra*). If it is doubtful whether the winding up will produce assets, an inquiry may be directed (*In re Olathe Silver Mining Co.*, 1884, 27 Ch. D. 278; *In re Bahia Central Sugar Factories*, 1890, 34 Sol. J. 156).

A shareholder in a limited company presenting a winding-up petition is in a very different position from a creditor. A shareholder has no right to stop the company's business when a large majority of shareholders wish to go on (*In re Middlesborough Assembly Rooms*, 1880, 14 Ch. D. 104). *A fortiori* if he is a fully-paid shareholder (*In re Patent Artificial Stone Co.*, 1864, 34 Beav. 185).

Winding-up Order—Appeal.—A winding-up order is appealable (Judicature Act, 1873, s. 19; Companies Act, s. 124). Only the company or a creditor or contributory can appeal (*In re Bradford Navigation Co.*, 1870, L. R. 5 Ch. 600). The time for appealing is twenty-one days, extendible by the Court (*In re New Callao Co.*, 1883, 22 Ch. D. 484). If a limited company is the sole appellant it will be ordered to give security for costs (*In re Diamond Fuel Co.*, 1879, 13 Ch. D. 400).

Costs.—The general rule is to give one set of costs among creditors and one set of costs among contributories appearing to support the winning side (*In re Peckham Tramways Co.*, 1888, 57 L. J. Ch. 462; *In re Criterion Gold Mining Co.*, 1889, 58 L. J. Ch. 277; *In re Brighton Marine Palace Co.*, W. N. 1897, 12). A successful petitioner's costs are a first charge on the assets (*In re Capital Fire Insurance Association*, 1883, 24 Ch. D. 415). Creditors and contributories appearing in an appeal and supporting the winning side will be allowed their costs of appeal (*In re New Gas Co.*, 1877, 5 Ch. D. 703). The order in which costs of winding up are payable out of the assets are prescribed by r. 31 of the Winding-up Rules, 1890.

The Official System.—Under the official system of administration introduced by the Companies (Winding-up) Act, 1890, the proceedings in a winding up by the Court have been closely assimilated to those in bankruptcy. The matters arising in the execution of the Act are assigned to the bankruptcy department of the Board of Trade; the official receiver is, as in bankruptcy, an officer of the Board of Trade (albeit he is also an officer of the Court). He is appointed by the Board of Trade, and is accountable to it. The Board audits his accounts, takes cognisance of his conduct when acting as liquidator (Companies (Winding-up) Act, 1890, s. 25), and gives him directions just as it does a trustee in bankruptcy. All moneys received by the liquidator have

to be paid by him into the Companies Liquidation Account at the Bank of England, as in bankruptcy into the Bankruptcy Estate Account, within ten days. The public examination of directors (see p. 217), the committee of inspection (p. 222), the employment of special managers (p. 219), are all parts of the bankruptcy machinery imported into winding up. This official control is designed to secure purity and efficiency of administration, but it is also designed to be disciplinary. It is a recognition of the principle that the State—the community at large—is interested in the maintenance of a high standard of commercial integrity, and in the detection and punishment of fraud, and that these are not matters merely between man and man.

When a winding-up order is made, a copy of the order is sent by the registrar to the official receiver and by him served on the secretary of the company, and it then becomes the duty of the secretary and other officers of the company to attend on the official receiver and make out a statement of the affairs of the company in the prescribed form, verified by affidavit (Companies (Winding-up) Act, 1890, s. 70; Winding-up Rules, 1890, 58–62). This statement of affairs is placed by the official receiver on the file of proceedings. As soon as the statement is prepared and filed (Winding-up Rules, r. 45), but not before, separate meetings of creditors and contributories are to be summoned by the official receiver—called the first meetings—to determine two things—(1) whether the Court shall be applied to to appoint a liquidator in place of the official receiver, and (2) whether the Court shall be applied to to appoint a committee of inspection to act with the liquidator, and if so, who are to be the members of such committee (Companies (Winding-up) Act, 1890, s. 6). The official receiver acts as chairman at these meetings. A person cannot vote as a creditor at the meetings unless he has duly proved a debt due to him from the company (Companies (Winding-up) Act, First Schedule (6)), or in respect of an unliquidated or contingent or unascertainable (*ibid.* (7); see *Ex parte Ruffle*, 1873, L. R. 8 Ch. 997; *Ex parte Pearce*, 1879, 13 Ch. D. 262; *In re Canadian Pacific Colonisation Co.*, W. N. 1891, 122). A secured creditor, unless he surrenders, must assess the value of his security. A creditor or contributory may vote either in person or proxy in the prescribed forms. The directors and other officers must attend the meetings (Winding-up Rules, 1890, r. 43).

As soon as practicable after receipt of the company's statement of affairs the official receiver is to submit a preliminary report to the Court—“(a) as to the amount of capital subscribed and paid up, and the estimated amount of assets and liabilities; (b) if the company has failed, as to the causes of failure; (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of the business thereof.” This report is ordinary routine. The official receiver *may* also issue a further report or reports stating the manner in which the company was formed, and whether in his opinion “any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.” Thereupon the Court may, on considering the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend and be publicly examined on oath as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as

director or officer of the company (Companies (Winding-up) Act, 1890, s. 8). In *Ex parte Barnes*, [1896] App. Cas. 146, the House of Lords has now held that there must first be a finding by the official receiver that fraud has been committed by the individual person pointed out by the report, before the Court can direct a public examination, and that then he and only he can be summoned. The section is a quasi-penal one, and must be strictly construed. These conditions have gone far to render the section a dead letter. When a public examination is directed, it is held before the registrar at a time and place fixed by the Court. The shorthand notes are evidence against the examinee (Winding-up Rules, 1890, r. 27, April 1892).

Liquidator.—The official receiver is contemplated by the Companies (Winding-up) Act, 1890, as normally the proper person to act as liquidator. No one else but the official receiver can after a winding-up order be provisional liquidator (Companies (Winding-up) Act, s. 4 (5); *In re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220). It is the official receiver who on the making of a winding-up order is charged with the conduct of the proceedings. He is to act as liquidator during any vacancy in the office (Companies (Winding-up) Act, s. 4). But the Winding-up Act reserves power to the creditors and contributories at the first meeting after the winding-up order to determine whether they will have a liquidator of their own choice—a commercial liquidator—or accept the official receiver as such. If the creditors and contributories are unanimous in wishing for a liquidator of their own, the Court will give effect to their wishes. If they cannot agree, the Court will decide between them.

If a liquidator other than the official receiver is appointed, he is not to act until he has notified his appointment to the Registrar of Joint-Stock Companies and given security to the satisfaction of the Board of Trade (Winding-up Act, 1890, s. 4 (3)); but when he has done so his title relates back to the commencement of the winding up (*Wiltshire Iron Co. v. Great Western Ry. Co.*, 1881, L. R. 6 Q. B. 176).

A liquidator is an agent, not a trustee (*Knowles v. Scott*, [1891] 1 Ch. 717). He differs from a trustee in bankruptcy in one important respect, that he has not the assets of the company vested in him (*Ebsworth & Tidy's Contract*, 1889, 42 Ch. D. 49). A liquidator, so far as he represents the company, has only the rights of the company, but so far as he represents creditors through the company he has more extensive rights (*In re London Celluloid Co.*, 1888, 39 Ch. D. 204). He may, for instance, resist rescission where the company could not (*Tufnell & Ponsonby's case*, 1885, 29 Ch. D. 432), or specific performance (*British Water Gas Syndicate v. Notts*, 1889, 1 Meg. 435), or call up the amount unpaid on shares, though the company has agreed that the shares should be paid by instalments (*Cordora Union Gold Co.*, [1891] 2 Ch. 580). The powers of a liquidator are very large. In exercising them he is to have regard at all times to the wishes of creditors and contributories (Companies Act, s. 91), and for the purpose of ascertaining such wishes he may at any time summon general meetings (Companies (Winding-up) Act, 1890, s. 23; Winding-up Rules, 1890, r. 47). Some of these powers are exercisable without the sanction of the Court or the committee of inspection—the power for instance to sell the property of the company, prove in the bankruptcy of a contributory, or take out administration, draw bills of exchange, give receipts, execute documents (Companies Act, s. 95; Winding-up Act, 1890, s. 12). Other powers, such as the power to make calls, to carry on the company's business, to bring or defend actions, or compromise with creditors or contributories, or employ a

solicitor, are exercisable only with the sanction of the Court or the committee of inspection.

The liquidator can only carry on the business of the company so far as may be necessary for the beneficial winding up of the same (*Ex parte Emmanuel*, 1881, 17 Ch. D. 35). If he requires a special manager he must get the leave of the Court (Winding-up Act, 1890, s. 5; Winding-up Rules, 1890, r. 42). He must keep a distinct account of the trading, and submit it once a month at least to the committee of inspection (Winding-up Rules, 1890, r. 137).

As to compromises with contributories and debtors, see *Bank of Hindustan v. Eastern Financial Assoc.*, 1869, L. R. 2 P. C. 501; *In re Commercial Bank Corporation of India and the East*, 1869, L. R. 8 Eq. 241; *Pearson's case*, 1872, L. R. 7 Ch. 309; *Roberts v. Crowe*, 1872, L. R., 7 C. P. 629; *Hunkey's case*, 1872, 41 L. J. Ch. 385.

Contracts.—The insolvency or winding up of a company is not of itself a breach of a contract by the company (*In re Agra Bank*, 1867, L. R. 5 Eq. 165); for instance, for the delivery of goods (*Ex parte Halliday*, 1858, 2 De G., J. & S. 312). The liquidator has the option of completing (*In re Asphaltic Wood Pavement Co.*, 1885, 30 Ch. D. 216); but the company may, by winding up, disable itself from completing a contract, and it is then liable in damages. Whether a liquidator has made himself personally liable or not in contracting is a question of fact (*In re Original Hartlepool Collieries Co.*, 1882, 51 L. J. Ch. 508).

Sales by Liquidator.—The liquidator of a company has the largest power under sec. 95 of the Companies Act to sell the assets of the company by private contract or public auction, *en bloc* or in parcels (*In re Oriental Bank Corporation*, 1887, 56 L. T. 868). A claim of the company against ex-directors for misfeasance may be sold by a liquidator under sec. 95 (3) as part of the company's assets (*In re Park Gate Waggon Works Co.*, 1881, 17 Ch. D. 234). Such misfeasance claims have even been put up of late to auction.

Removal of Liquidator.—A liquidator may be removed under secs. 93, 141 of the Companies Act, authorising removal on "due cause shown," wherever it is for the benefit of all those interested in the company being liquidated. It is not necessary that there should be any personal unfitness (*In re Adam Eytton*, 1887, 36 Ch. D. 299). Whether due cause has been shown is a question on which the Court of Appeal may review the decision of the judge below (*In re Sir John Moore Gold Mining Co.*, 1879, 12 Ch. D. 325). It is ground for removal if the same person is liquidator of two companies whose interests are conflicting (*In re City and County Investment Co.*, 1872, 25 W. R. 342); if he is obstructing an action by a contributory to recover money improperly received by the directors and by the liquidator himself when secretary (*Sir John Moore, supra*); if he insists on prosecuting an action against the wishes of the creditors where the assets are deficient (*In re Tavistock Iron Works*, 1871, 19 W. R. 672); or if there is any corruption or impropriety on his part (*In re London Flour Co.*, 1868, 16 W. R. 553); but it is no ground that the liquidator has an interest in a syndicate which buys the liquidating company's property, if there is no evidence that the liquidator has abused his position (*In re Llynvi and Tondy Co.*, 1889, 6 T. L. R. 11), or that he has refused to employ a solicitor pressed on him by the creditors (*In re Plymouth Patent Sugar Refining Co.*, W. N., 1870, 84), or that a lay liquidator is willing to act gratuitously (*In re Civil Service Stores*, W. N., 1884, 158). Removal will not affect the liability to account (*In re Tatum*, 1889, 6 Morr. 107; *In re Rogers*, 1887, 4 Morr. 57).

Remuneration of Liquidator.—Under the new practice (Winding-up Rules, 1890, r. 154) the liquidator's remuneration is fixed by the committee of inspection, and is to be in the nature of a commission or percentage—one part payable on the amount of the assets realised after deducting sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend. This is meant as a premium on diligence.

The first duty of the Court acting by its officer, the liquidator, is to collect the company's assets and apply them in discharge of its liabilities (Companies Act, s. 98). A company's assets on a winding up consist of all its property, including unpaid capital recoverable from present and past members (*Webb v. Whiffin*, 1872, L. R. 5 H. L. 724). But the bankruptcy rules as to reputed ownership and the avoidance of voluntary settlements do not apply (*Gorringe v. Towell Indianrubber Works*, 1886, 34 Ch. D. 128; *In re Gould*, 1887, 19 Q. B. D. 92). Frequently the business of the company is its most valuable asset, and to enable it to be sold as a going concern the official receiver, as liquidator, must carry it on. For this purpose he may be allowed the assistance of a special manager by the Court (Companies (Winding-up) Act, 1890, s. 5; Winding-up Rules, 1890, r. 42).

Fraudulent Preference—Dispositions pending Winding up.—In winding up, as in all systems of insolvent administration, it is necessary to provide against either the giving or getting of an unfair advantage. It destroys that equality which is equity. The giving of an unfair advantage is met by two sections in the Companies Act, s. 48 (fraudulent preference) and s. 153 (dispositions pending winding up). The principles as to fraudulent preference are the same in winding up as in bankruptcy, and are illustrated in *Willmott v. London Celluloid Co.*, 1886, 34 Ch. D. 150; *Mason, Gallagher, & Slater's case*, 1882, 30 W. R. 378; *Poole, Jackson, & Whyte's case*, 1878, 9 Ch. D. 322; *Sykes' case*, 1872, L. R. 13 Eq. 255).

The effect of sec. 153 is to make directors *prima facie* liable for all moneys of the company expended by them not in the ordinary course of business since the commencement of the winding up (*In re Neath Harbour Smelting Works*, 1887, 35 W. R. 827; *In re Wiltshire Iron Co.*, 1868, L. R. 3 Ch. 443). If payments are made honestly and in the ordinary course of business after presentation of a winding-up petition, it is usual for the Court to allow them under sec. 153, but directors should be on their guard what they do after a petition is presented. Accepting bills in the ordinary course of business (*Bolognesi's case*, 1870, L. R. 5 Ch. 567), and delivering goods ordered (*In re Wiltshire Iron Co.*, *supra*), have been confirmed, but payment to a petitioning creditor was disallowed (*In re Liverpool Service Assoc.*, 1874, L. R. 9 Ch. 54; and see *In re Civil Service General Store*, 1883, 52 L. J. Ch. 119).

Stay of Actions and Executions.—The other mode of getting an unfair advantage is by seizing a company's property when it is *in extremis*. To defeat this the Companies Act stops summarily all actions and proceedings against the company (ss. 85, 87), and avoids all the attachments, sequestrations, distresses, or executions put in force against the estate and effects of the company after the commencement of the winding up (s. 163), thus compelling creditors to come in and share rateably (*In re International Pulp and Paper Co.*, 1876, 3 Ch. D. 598; *In re David Lloyd & Co.*, 1877, 6 Ch. D. 344; *In re Great Ship Co.*, 1866, 4 De G., J. & S. 70). In all cases, however, the Court has a discretion, to be exercised, not for the benefit of any particular creditor, but for the general body of creditors interested under the Act (*Smith, Fleming, & Co.'s case*, 1866, L. R. 1 Ch. 545; *In re Vron Colliery Co.*,

1882, 20 Ch. D. 445). The Crown is not bound by the Companies Act, not being specially mentioned, and the Court has therefore no jurisdiction under sec. 87 to restrain the Crown from proceeding by way of distress or any other process for arrears of income-tax owing by a liquidating company (*In re Henley & Co.*, 1878, 9 Ch. D. 469).

Actions.—An application to stay an action against a company pending hearing of a winding-up petition against the company is to the Division of the High Court in which the action is pending (*Artistic Colour Printing Co.*, 1880, 14 Ch. D. 502). It may be made by the company or by a creditor or contributory. Where a winding-up order has been made, the action is automatically suspended, and if the plaintiff desires to proceed with it he must get the leave of the Court which has made the winding-up order (*Wilson v. Natal Investment Co.*, 1867, 36 L. J. Ch. 312). A mortgagee of a company is entitled to leave to commence or continue an action to realise his security; for the property is *pro tanto* his (*In re David Lloyd & Co.*, 1877, 6 Ch. D. 339). In other cases it is a matter of convenience for the discretion of the Court. Leave has been given to continue an action for specific performance (*Thames Plate Glass Co. v. Land Telegraph Co.*, 1870, L. R. 11 Eq. 248) for trespass—to determine the plaintiff's right (*Wyley v. Exhall Coal Co.*, 1864, 33 Beav. 538); for re-entry (*In re Strand Hotel Co.*, W. N., 1868, 2), and for damages under Lord Campbell's Act (*In re Thurso New Gas Co.*, 1889, 42 Ch. D. 491), and for an account (*M'Ewen v. London, Bombay, and Mediterranean Bank*, 1867, 15 W. R. 245). Leave will not be given on an *ex parte* application (*Western and Brazilian Telegraph Co. v. Bibby*, 1880, 42 L. T. 821). In staying an action commenced before the winding up, whether such winding up is by the Court or voluntary, the Court allows the creditor, on proving, to add to his debt the costs of the action down to the time of his receiving notice of the winding up (*In re Keynsham Co.*, 1863, 33 Beav. 123). A creditor who commences an action against a company after notice of a winding up will be ordered to pay the costs of the action and of the motion to stay (*In re East Kent Shipping Co.*, 1868, W. N., 1868, 206). The judge of the winding-up Court has power also, on an *ex parte* application, to order a transfer to himself of any cause or matter pending in another Court brought by or against the company (R. C. S., 1883, Order 49, r. 5; *In re Landore-Siemens Steel Co.*; *In re Poole*, 1886, 55 L. T. 56).

Distress.—In all cases in which a landlord seeks to distrain after a winding-up order he must show why he should have such an advantage over the other creditors (*In re Oak Pits Colliery Co.*, 1883, 21 Ch. D. 329). A landlord is not a "secured creditor" so as to be entitled under sec. 10 of the Judicature Act, 1875, to distrain for one year's arrears of rent under the rule in bankruptcy (*In re Bridgewater Engineering Co.*, 1879, 12 Ch. D. 181). The rights of the landlord of a company have been summed up in the following propositions in the above case of *In re Oak Pits Colliery Co.*:—(1) Rent in arrear at the commencement of the winding up. If the landlord is a legal creditor of the company in respect of rent in arrear at the commencement of its winding up, he is not allowed to distrain for the arrears of rent, but must prove his debt like any other creditor. If the landlord is not a legal creditor of the company by reason of the company not being his tenant, he is permitted to distrain for rent in arrear at the commencement of the winding up (see *In re Carriage Co-operative Supply Assoc.*, 1883, 23 Ch. D. 154). (2) Rent accruing after the commencement of the winding up. A landlord of a company in winding up who applies for leave to levy a distress for rent accrued since the com-

mencement of the winding up must show either that it is inequitable that the company should be protected by sec. 163 (avoiding distresses), or that the rent is properly payable as part of the costs, charges, and expenses of the winding up. If the liquidator, for instance, has retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding up—it is a debt contracted for the winding up of the company, and ought to be paid in full. See *In re International Marine Hydropathic Co.*, 1884, 28 Ch. D. 470; *In re National Arms and Ammunition Co.*, 1885, 33 W. R. 585. If the occupation is for the benefit of the landlord as well as the company it is different (*In re Bridgewater Engineering Co.*, 1879, 12 Ch. D. 181). A mortgagee with an attornment clause is not in as good a position as a landlord (*In re Lancashire Cotton Spinning Co.*, 1887, 35 Ch. D. 656).

Executions.—If the sheriff has seized before presentation of a winding-up petition, the Court will not interfere (*In re Great Ship Co.*, 1864, 33 L. J. Ch. 245). The creditor is a secured creditor (*In re Printing Co.*, 1878, 8 Ch. D. 538; *In re United English Co.*, 1868, L. R. 3 Ch. 720); nor is notice to the sheriff of a winding-up petition like notice of a bankruptcy petition (*In re Withernsea Brickworks*, 1880, 16 Ch. D. 337). A garnishee order served before presentation of the petition is thereby “put in force,” and the Court will not interfere (*In re Stanhope Silkstone Co.*, 1881, 20 Ch. D. 442; and see *In re Hille Indianrubber Co.* (No. 2), W. N., 1897, 20).

Assets.—The end and aim of the winding-up administration, to sum it up in a few words, is to collect the company's assets and apply them in discharge of the liabilities. A company's assets consist of all its property, including uncalled capital recoverable from past and present members; but it does not include property of which the company is reputed owner, neither the order and disposition clause nor the bankruptcy rules as to voluntary settlements applying to winding up (*Gorringe v. Irwell Indianrubber Works*, 1886, 34 Ch. D. 128; *In re Gould*, 1887, 19 Q. B. D. 92). Winding up also differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and general, is taken out of the bankrupt, and is vested in the trustee; whereas in a winding up the legal estate still remains in the company (*In re Oriental Inland Steam Co.*, 1874, L. R. 9 Ch. 960). For the purpose of collecting the assets the Court in winding up has very great powers—power to order any contributory, trustee, receiver, banker or agent, or officer of the company to pay any sum of money or deliver books, papers, estate, or effects to which the company is *prima facie* entitled (s. 100); power to order payment of debts or dividends improperly received by a contributory (s. 101); power to summon before it any officer of the company or person known or suspected to have in his possession any of the estate and effects of the company or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade dealings, estate, or effects of the company, and to require the person summoned to produce any relevant books or papers. The object of this large power of discovery, which from its inquisitorial character has been called the Star Chamber clause, is to get information which will enable the Court to see what course ought to be followed with reference to some matter or some claim in the winding up (*In re Grey's Brewery Co.*, 1884, 53 L. J. Ch. 262). The power is discretionary (*In re Imperial Continental Water Corp.*, 1886, 33 Ch. D. 314). Usually the liquidator makes the application for the order, scheduling

the names of the examinees (*In re Gold Co.*, 1879, 12 Ch. D. 84); but if the liquidator does not wish to do so, or is himself implicated, a contributory may apply (*In re London and Lancashire Paper Mills Co.*, 1888, 57 L. J. Ch. 766); but a contributory will not be allowed to use the section to get discovery in an action which he is bringing against the company or the directors for his own individual benefit (*In re Imperial Continental Water Corp.*, 1886, 33 Ch. D. 314; *In re North Australian Territory Co.*, 1890, 45 Ch. D. 87; and see *Ex parte Leaver*, 1885, 51 L. T. 817). All sorts of persons may be examined—the company's directors, its solicitors and brokers, a contributory's banker, partner, stockbroker, relatives (*Forbes' case*, 1872, L. R. 14 Eq. 6; *Ex parte Paine & Layton*, 1869, L. R. 4 Ch. 215). The proper mode of enforcing attendance is by summons in chambers. Every witness summoned is entitled to his reasonable expenses (*Ex parte Waddell*, 1877, 6 Ch. D. 330). The examination is held before the registrar in chambers, or if specially ordered before an examiner of the Court (Winding-up Rules, April 1892, r. 3 (2)). The place where it is held is not a public Court (*In re Western of Canada Oil Co.*, 1877, 6 Ch. D. 109). An examinee has a right to have his counsel and solicitor present at the examination (*In re Breck-loading Armory Co.*, W. N., 1867, 225). The depositions of an examinee can be used as evidence only against the deponent himself (*In re Great Western (Forest of Dean) Coal Consumers Co.*, 1885, 33 W. R. 444). The depositions when finished are filed by the examiner, but the leave of the Court must now be obtained to inspect them or take copies.

Surplus Assets.—Surplus assets must, on a winding up, be distributed (if the articles are silent) in proportion to the shares held, not in proportion to the amounts paid on the shares; it makes no difference (1) that the shares of the company are paid up unequally, some being fully paid, others being paid up only in part; or (2) that the fully paid up shares were issued separately as preference shares, carrying a preferential dividend of 5 per cent. without any further right to participate in the profits of the business; or (3) that, by the regulations of the company, dividends on the company's shares are payable in proportion to the amounts paid up (*Birch v. Cropper*, 1889, 14 App. Cas. 525). The same principle applies where there has been a loss instead of a gain; the losses must be borne by the shares equally (*Ex parte Maude*, 1870, L. R. 6 Ch. 51; and see *In re Weymouth Steam Packet Co.*, [1891] 1 Ch. 66).

The Committee of Inspection.—This is part of the bankruptcy machinery imported into winding up. The committee is appointed by the creditors and contributories (if they decide on having one) at their first meeting. It is designed to watch and supervise the proceedings of the liquidator. The committee is to consist of creditors and contributories, and is to meet not less than once a month. It may at any time require inspection of the liquidator's record and cash books (Winding-up Rules, 1890, r. 144 (2)), and the liquidator is to have regard to its directions. If those directions conflict with the directions of the creditors and contributories in general meeting, the directions of the creditors and contributories must prevail. The committee's sanction is necessary to the liquidator bringing or defending any legal proceeding, or carrying on the business of the company, or compromising with a creditor or contributory (Winding-up Act, 1890, s. 12 (1)). No member of the committee can directly or indirectly purchase any of the company's assets, or derive any profit from any transaction arising out of the winding up, or receive out of the assets payment for services rendered or goods supplied to the liquidator. These principles are well illustrated

in *In re Gallard*, [1896] 1 Q. B. 68. The sanction of the Court may be obtained, but only where the service is of a special nature. No payment is under any circumstances allowed to a member of the committee for services rendered by him in discharge of the duties of his office (*Winding-up Rules*, 1890, r. 160).

Contributories.—When a company is wound up every present member, so far as his shares are unpaid, is liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities, the costs of winding up, and such sums as may be required for the adjustment of the rights of contributories among themselves (*Companies Act*, s. 38; *Birch v. Cropper*, 1889, 14 App. Cas. 543). This liability is a statutory one, creating a specialty debt (*Ex parte Branchite*, 1879, 48 L. J. Ch. 463). If the contributions of the present members, called the "A List," are insufficient, then past members, called the "B List," may be called upon, unless they have ceased to be members for a period of one year prior to the commencement of the winding up (*Companies Act*, s. 38). The definition of "member" in sec. 23 of the *Companies Act* is important for this purpose. It says: "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed"; and "Every other person" (*i.e.* other than the subscribers of the memorandum) "who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The meaning of this is explained by Cotton, L.J., in *Arnot's case*, 1888, 36 Ch. D. 707. "To enable it to be said," says the learned judge, "under the 23rd section, that anyone has agreed to become a member (and therefore a contributory) it must be shown either (1) that with his own knowledge and assent he is entered as the holder of shares upon the register of shareholders, or (2) that a contract was entered into by the alleged contributory which ought to be specifically performed, so that the Court would be justified without the consent of the alleged contributory in putting him upon the register in respect of shares which it is said he had contracted to take from the company." From this and other cases it is plain that a person may be a member although his name is not on the register at the date of the winding up. The register is not conclusive, for it is to be rectified by the Court after winding up (*Companies Act*, 98; *Reese River Silver Mining Co. v. Smith*, 1869, L. R. 4 H. L. 77, 80). There is an important distinction between the case where the alleged contributory is on the register and where the contract is one resting only *in fieri*. In the latter case, where the status of membership is not complete and the liquidator claims specific performance by putting the shareholder on the list, he can only make the same claim against the alleged shareholder that the company could have made (*In re Anglesea Colliery Co.*, 1866, L. R. 1 Ch. 555; *Tufnell and Ponsonby's case*, 1883, 23 Ch. D. 432). But where the status of membership has been acquired by a concluded contract and entry on the register, the specific performance test does not apply (*Fisher's case*, 1886, 31 Ch. D. 120, 129). "A man," as Jessel, M. R. said, "can only become a member of a company and a contributory by contract" (*Hamley's case*, 1877, 5 Ch. D. 706). The directors putting a person's name improperly upon the register as a shareholder, when he has not agreed to become such, cannot render him liable to creditors (*Chapman and Barker's case*, 1867, L. R. 3 Eq. 365). A fully-paid shareholder is a contributory, and though he cannot be called upon to pay more, may claim to be put on the list in order to get the benefit of an adjustment of rights between

the shareholders (*In re Hollyford Mining Co.*, Ir. R. 1 Eq. 39). A person who has applied for shares in the name of another without authority cannot be made a contributory if he had no intention of contracting personally (*Coventry's case*, [1891] 1 Ch. 202; *Muir v. City of Glasgow Bank*, 1879, 4 App. Cas. 368). But if a person being entitled to have shares allotted to him takes them in the name of a fictitious person, he will be put on the list as a contributory, the nominee in such a case being merely an alias (*Yeoland's Consols*, 2 Meg. 74). When a contributory becomes bankrupt after the commencement of the winding up, the trustee in bankruptcy, not the bankrupt, is the proper person to be placed on the list (*M'Ewen's case*, 1871, L. R. 6 Ch. 582), and the liquidator may prove against the estate the estimated value of the liability to future calls as well as calls already made (Companies Act, s. 75). Every liability of a bankrupt under a contract, however difficult of valuation, is provable in the bankruptcy, unless declared by the Court incapable of being fairly estimated (*Hardy v. Fothergill*, 1888, 13 App. Cas. 351). The trustee may, under sec. 55 of the Bankruptcy Act, 1883, disclaim the shares or stock by writing, in which case the company may prove as a creditor for the injury (*Ex parte Budden & Roberts*, 1879, 12 Ch. D. 288). As to the measure of damages, see *In re Hallett*, 1894, 1 Manson, 380.

If a contributory dies either before or after he has been placed on the list, the shares vest in his personal representative, and whether such personal representative is registered or not in respect of them, the estate is liable (Companies Act, s. 76; *Steward v. Heatley*, 1854, 3 De G., M. & G. 628, 647; *Baird's case*, 1870, L. R. 5 Ch. 725), and the executor is the right person to be put on the list (*Keen's Executor's case*, 1853, 3 De G., M. & G. 272). But he is only liable in an executorial capacity (*Buchan's case*, 1879, 4 App. Cas. 597; and see *Jerris v. Wolfersham*, 1874, L. R. 18 Eq. 18, and *Markwell's case*, W. N. 1872, 210). An executor may, however, render himself personally liable by accepting shares for his testator's estate (*Dobson's case*, 1866, L. R. 1 Ch. 231). He has still a right of indemnity against the estate (*Duff's Executor's case*, 1886, 32 Ch. D. 309).

Firm.—A firm may be a contributory (*Needham's case*, 1867, L. R. 4 Eq. 135).

Infant.—If an infant shareholder is still an infant at the date of the winding up, his name must be struck off the list of contributories (*Symons' case*, 1870, L. R. 5 Ch. 298), the Court electing for him (*Reid's case*, 1858, 24 Beav. 318, and see *Wilson's case*, 1869, L. R. 8 Eq. 240). But if he is of age the question then arises whether he has elected to take shares.* An allotment or transfer to an infant is not *ab initio* void, but only voidable. Consequently if the infant, on coming of age before a winding up, has elected to keep the shares, he will then be a contributory. Such election may be evidenced by the ex-infant not repudiating within a reasonable time after coming of age, or exercising acts of ownership over the shares (*Lumsden's case*, 1868, L. R. 4 Ch. 31; *Dublin and Wicklow Rwy. Co. v. Black*, 1870, L. R. 8 Eq. 181). What is reasonable time depends on circumstances (*Carter v. Silber*, 1891, 39 W. R. 556; *Ebbett's case*, 1870, L. R. 5 Ch. 302; *In re Yeoland's Consols*, 1888, 58 L. T. 922). A transfer of shares to an infant is voidable at the option of the company as well as the option of the infant (*Gooch's case*, 1872, L. R. 8 Ch. 266, and see *Curtis' case*, 1868, L. R. 6 Eq. 455); but the company must promptly give notice on discovering the infancy of the transferee, that it holds the transferor liable, otherwise it will dis-entitle itself to any remedy against him (*Parson's case*, 1869, L. R. 8 Eq. 656).

Married Woman.—Upon principle there is nothing to prevent a married

woman with separate property becoming a shareholder in a company and liable as a contributory (*In re Leeds Banking Co.*, 1866, L. R. 3 Eq. 781). As to the husband's liability, see Companies Act, s. 78; Married Women's Property Act, 1882, ss. 13, 14; *Angus' case*, 1847, 1 De G. & Sm. 560; *Ex parte Hatcher*, 1879, 12 Ch. D. 284).

Mortgagee.—A mortgagee who takes a transfer to himself of shares not fully paid up, and is registered, incurs all the liabilities of a shareholder (*Price & Brown's case*, 1850, 3 De G. & Sm. 146).

Participating Policyholder.—A participating policyholder in a mutual life assurance company may be liable as a contributory (*Winstone's case*, 1879, 12 Ch. D. 239), but not till after shareholders are exhausted (*In re Albion Life Assurance Society*, 1880, 15 Ch. D. 79).

Sale of Shares.—If a man, being a shareholder, has sold his shares, he is not relieved from being a contributory if owing to any cause, except the neglect of the company, the transferee's name has not been substituted for his at the date of the winding up (*Marshall v. Glamorganshire Iron Co.*, 1868, L. R. 7 Eq. 137; *Erans' case*, 1866, L. R. 2 Ch. 427).

Trustee.—A registered holder of shares is none the less liable that he is a trustee of them. He cannot, like an executor, be a contributory, in a representative capacity only (*Hoare's case*, 1867, 2 John. & H. 229). His only right is that of indemnity against his *cestui-que trust* (*Levi v. Ayres*, 1878, 3 App. Cas. 852). There is no contract by the *cestuis-que trust* with the company which would entitle the Court to put them on the list (*Barrett's case*, 1864, 4 De G. J. & S. 416). As to where a company takes a transfer of its own shares in the name of a director as trustee for it, see *Cree v. Somervail*, 1879, 4 App. Cas. 648. The Glasgow Bank failure furnished numerous illustrations of the disastrous position of trustees of an unlimited company (*Muir v. City of Glasgow Bank*, 1879, 4 App. Cas. 337; *Cunningham v. City of Glasgow Bank*, 1879, 4 App. Cas. 610).

A trustee of shares has a right to be provided by his *cestui-que trust* as soon as a call is made with funds to pay it (*In re National Financial Co.*, 1868, L. R. 3 Ch. 791); but he cannot maintain an action for indemnity while the liability is contingent only, that is, when no call has been made or is likely to be made (*Hughes Hallett v. Indian Mammoth Gold Mines Co.*, 1882, 22 Ch. D. 561).

It is the liquidator's duty with all convenient speed after his appointment to settle a list of contributories (Companies Act, ss. 98, 99, Winding-up Rules, 1890, r. 83), and for that purpose he gives notice of the time and place appointed for settlement to every person whom he proposes to include in the list (Winding-up Rules, r. 84). If any person objects, the liquidator hears him, and, after such hearing, finally settles the list (Winding-up Rules, 1890, r. 85), and gives notice to the persons settled on it. The list consists of two parts—the "A list" or present members, and the "B list" or past members. Before the Court will sanction a call on past members it must have (1) proof of unpaid debts existing at the time when the past member ceased to be a member, and (2) reasonable evidence that the existing assets of the company, including therein the liability of the existing shareholders, will be exhausted (*Helbert v. Banner*, 1871, L. R. 5 H. L. 28; *Webb v. Whiffin*, 1872, L. R. 5 H. L. 718; and see *Brett's case*, 1871, 6 App. Cas. 800; and *Morris' case*, 1872, L. R. 7 Ch. 200; L. R. 8 Ch. 810). The contributions of both lists go, however, into a common fund. A shareholder who has transferred his shares within a year of a winding up is liable, as a past member, though the shares have been forfeited in the hands of the transferee (*Bridger and Neill's cases*, 1869, L. R. 4 Ch. 266; *Creyke's case*, 1869, L. R. 5 Ch. 63). Where share-

holders in a company had transferred their shares less than a year before a resolution of the company for a voluntary winding up, but more than a year before a subsequent compulsory order for winding up, the Court held that the winding-up order did not relate back to the date of the resolution for a voluntary winding up, so as to make the shareholder liable to be put on the "B list" (*In re Taurine*, 1883, 25 Ch. D. 118).

A person who is on the list and disputes his liability may take out a summons to have his name removed. If he fails, he must pay the costs (*In re Birkbeck Life Insurance Co.*, 1862, 2 Drew. & Sm. 321). Any creditor or contributory may appeal against an order striking a person off the list of contributories (*Ship's case*, 1865, 2 De G. J. & S. 550). An appeal to the Court of Appeal must be brought within twenty-one days (*Companies Act*, s. 124).

Calls in Winding up.—The liquidator cannot make a call on the contributories without the special leave of the Court or the sanction of the committee of inspection. His course is to summon a meeting of the committee for the purpose (Winding-up Rules, 1890, r. 92). If there is no committee of inspection, the liquidator takes out a summons to obtain the leave of the Court to make a call, and gives notice by advertisement to all persons interested of the time fixed for the hearing of the summons (Winding-up Rules, 1890, r. 93). If the Court sanctions the call, the Court of Appeal will not review its discretion (*Helbert v. Banner*, 1871, L. R. 5 H. L. 28). Notice of the call sanctioned by the committee or the Court is sent by post to the contributories. An order for a call cannot be served out of the jurisdiction (*In re Anglo-African Steamship Co.*, 1886, 32 Ch. D. 348); but notice of an appointment to settle the list of contributories (*In re Nathan Newman & Co.*, 1887, 35 Ch. D. 1), or notice of an intention to make a call (*In re General International Agency Co.*, 1867, 15 W. R. 973), may be served out of the jurisdiction, these being different from process. If a call is not paid, the liquidator may apply to the Court for an order to enforce it, scheduling to the summons the names of the defaulting contributories. This order is called a balance order, and is a summary statutory proceeding for the purpose of enabling the liquidator to get payment from a contributory in lieu of proceeding by action (*In re Saunders*, 1884, 13 Q. B. D. 478). A balance order is not a "final judgment" within the Bankruptcy Act, 1883, s. 4 (1) (3), on which a bankruptcy notice can be founded (and see *In re Hubback*, 1885, 29 Ch. D. 934). Nor can an action be brought by the liquidator on a balance order (*Chalk Webb v. Tennant*, 1887, 36 W. R. 263; *In re Shirley*, 1888, 58 L. T. 237; see, however, *Westmoreland Green Slate Co. v. Fielden*, 1891, 60 L. J. Ch. 301). If a contributory is absconding, the Court has jurisdiction to grant a writ of *ne exeat regno* (*In re Cotton Plantation Co. of Natal*, W. N. 1868, 79). *A. fi.-fa.* to enforce a call must follow the terms of the balance order (*Ex parte Waterloo Life Assurance Co.*, 1864, 4 N. R. 207). A bankruptcy petition, sequestration, a charging order, attachment of debts, *elegit*, equitable execution, administration (where a contributory is deceased), are all different modes of enforcing payment. To enforce payment of calls in an Irish or Scotch winding up by contributories in England, the order for a call by the Irish or Scotch Court must be made an order of the Chancery Division in England (*In re Hollyford Copper Mining Co.*, 1870, L. R. 5 Ch. 93).

Interest.—A provision in articles of association for payment of interest on calls is not applicable to calls by the liquidators (*In re Welsh Flannel Co.*, 1875, L. R. 20 Eq. 361); but interest will be payable under

3 & 4 Will. IV. c. 42 (*In re Overend, Gurney, & Co.*, 1868, L. R. 3 Ch. 784).

Set off.—A shareholder in a limited company cannot set off a debt against calls (*Gressell's case*, 1866, L. R. 1 Ch. 528); to allow set off would be in effect to allow a shareholder-creditor preferential payment out of his own calls (*Black's case*, 1872, L. R. 8 Ch. 254). The case of a bankrupt contributory is different (*In re Duckworth*, 1867, L. R. 2 Ch. 578).

Winding up—Creditors.—The object of the winding-up provisions of the Companies Act, 1862, is to put all unsecured creditors upon an equality, and to pay them *pari passu* (*In re Oak Pitts Co.*, 1882, 21 Ch. D. 329); and with this view the Companies Act provides that all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding in damages, shall be admissible to proof against the company. The provable obligations, the debts and liabilities of the company, are ascertained as they exist at the commencement of the winding up (*In re General Rolling Stock Co.*, 1871, 20 W. R. 762); but a creditor may come in and prove at any time before final distribution of the assets, so long as he does not disturb any dividend already paid (*In re General Rolling Stock Co.*, 1872, L. R. 1 Ch. 646; *Hicks v. May*, 1872, 13 Ch. D. 236). Proof must be made in the prescribed form, and state whether the claimant is a secured creditor or not (Winding-up Rules, 97, Form 66). The liquidator, or pending his appointment, the official receiver (Winding-up Rules, 115–128), is to examine every proof, and admit or reject it, in whole or in part, or require further evidence. If he gives notice rejecting it, and the creditor is dissatisfied, he may appeal.

Certain classes of debts in winding up, as in bankruptcy, are allowed a preference. These are—(1) Crown debts (*In re Oriental Bank*, 1885, 28 Ch. D. 643; *In re Henley & Co.*, 1878, 9 Ch. D. 469); (2) rates and taxes and the salary or wages of any clerk, servant, or workman (Preferential Payments Act, 1888, s. 1 (a) (b) (c); Winding-up Rules, 1890, r. 106; *In re Field*, 1887, 4 Morr. 63); (3) under sec. 10 of the Savings Bank Act, 1863, and see Savings Bank Act, 1891, s. 13 (*In re Williams*, W. N. 1887, 168, and see Friendly Societies Act, 1875, s. 15 (7), and *In re West of England Bank*, 1879, 11 Ch. D. 768).

A landlord has no priority in winding up (*Thomas v. Patent Leonite Co.*, 1881, 17 Ch. D. 250). He must prove (*In re Panther Lead Co.*, [1896] 1 Ch. 978; *Hardy v. Fothergill*, 1888, 13 App. Cas. 351), unless he has obtained leave to distrain (*In re Oak Pitts Colliery Co.*, 1882, 21 Ch. D. 322). See pp. 219, 220, *ante*.

Secured Creditors.—A secured creditor of a company can only prove for the balance of his debt after deducting the value of his security. This is the effect of sec. 10 of the Judicature Act abolishing the old Chancery rule and substituting that in bankruptcy (*In re Withernsea Brickworks*, 1880, 16 Ch. D. 337). Under the bankruptcy rules, a secured creditor may (1) rest on his security and not prove; (2) realise his security and prove for the deficiency; (3) value it and prove for the deficiency after deduction of the assessed value, in which case the liquidator may redeem at the assessed value; (4) surrender his security and prove for the whole debt (*In re Hopkins*, 1881, 18 Ch. D. 378).

Mutual Debts and Credits.—The mutual debts and credits section in bankruptcy is now imported into the winding up of an insolvent company by sec. 10 of the Judicature Act. *In re Milan Tramways Co.*, 1882, 22 Ch. D. 122; *Mersey Steel Co. v. Naylor, Benzon, & Co.*, 1883, 9 App. Cas. 436; *Eberle's Hotel Co. v. Jonas*, 1887, 18 Q. B. D. 465; *In re Asphaltic Wood*

Pavement Co., 1885, 30 Ch. D. 224, are illustrations. The latest case is *In re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567.

Winding up, Voluntary.—The policy of the Companies Acts is to let the shareholders manage their own affairs, and part of those affairs is the winding up of the company (*In re Wear Engine Works Co.*, 1875, L. R. 10 Ch. 191), and of this privilege companies avail themselves largely, 90 per cent. being so liquidated. To such a winding up by the shareholders, whether it is purely voluntary or under supervision, the provisions of the Companies (Winding-up) Act, 1890, have no application. Sec. 129 of the Companies Act, 1862, defines the circumstances under which a company may be wound up voluntarily. They are—“(1) Whenever the period (if any) fixed for the duration of the company by the articles of association expires or whenever the event (if any) occurs upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

“(2) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily.

“(3) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same.”

An extraordinary resolution is one passed in such a manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution. There must be a proper quorum at the meetings as required by the articles (*In re Cambrian Peat Co.*, 1875, 23 W. R. 405). The notice of meeting called to pass an extraordinary resolution for winding up need not follow the precise words of sec. 129 (3), but it must be such as to give the shareholders to understand that an extraordinary resolution to wind up will be proposed (*In re Bridport Old Brewery Co.*, 1867, L. R. 2 Ch. 191; *In re Silkstone Fall Colliery Co.*, 1876, 1 Ch. D. 38). There need not be evidence that the company is insolvent to justify the meeting in resolving on a voluntary winding up (*In re London Flour Co.*, 1868, 19 L. T. 138). The declaration of the chairman of the meeting that a resolution has been passed for voluntary winding up is sufficient evidence without the chairman making an affidavit (*In re Brynmawr Coal and Iron Co.*, 1877, W. N. 1877, 45). The extraordinary resolution need not be registered (*In re Outlay Assurance Society*, 1886, 34 Ch. D. 480), but it is to be advertised in the *Gazette*. The commencement of the winding up is the date of the confirmatory resolution (*In re Taurine Co.*, 1883, 25 Ch. D. 138; and see *In re West Cumberland Iron and Steel Co.*, 1889, 40 Ch. D. 361). The consequences which ensue on a voluntary winding up are as follows:—The property of the company—that is the assets of the company (*Webb v. Whiffin*, 1872, L. R. 5 H. L. 724)—is to be applied in satisfaction of its liabilities, *pari passu*, liquidators are to be appointed by the company in general meeting, and their remuneration fixed, and thereupon the directors' powers are to cease (except so far as continued by a general meeting). The liquidators may settle the list of contributories, make calls to satisfy debts and liabilities, and the costs, charges, and expenses of winding up, and may, without the sanction of the Court, exercise all powers given to the liquidator in a winding up by the Court (see *ante*). They are to pay the company's debts and adjust the rights of the contributories amongst themselves (Companies Act, s. 133). The scheme for voluntary winding up under the Companies Act in the matters of contribution and distribution

is in all essentials the same as in a winding up by the Court, though for the guidance of liquidators in a voluntary winding up the Legislature has been more specific in its directions (Companies Act, ss. 133, 144; *Webb v. Whiffin supra*). The appointment of a liquidator or liquidators, which is the first necessary step to carry on the liquidation, must not be made until after the confirmatory resolution has been passed, otherwise it is invalid (*In re Indian Zedone Co.*, 1884, 32 W. R. 481); but liquidators may be appointed at the same meeting at which the confirmatory resolution is passed, immediately after it (*In re Welsh Flannel and Treed Co.*, 1875, L. R. 20 Eq. 361), or immediately after an extraordinary resolution to wind up has been passed (*Oakes v. Turquand*, 1867, L. R. 2 H. L. 354). If two liquidators are appointed and one dies, the surviving liquidator cannot act (*In re Metropolitan Bank and Jones*, 1876, 2 Ch. D. 366). The secretary of the company, from his acquaintance with the affairs of the company, is a proper person to be, and often is, appointed liquidator (*In re London and Australian Agency Corp.*, 1873, 29 L. T. 417). In dealing with contributories, the liquidator should not apply to the Court under sec. 138 for a declaration that an alleged contributory is liable, but should put his name on the list and leave him to apply to the Court to strike it off (*In re Cornwall Brick Co.*, W. N. 1893, 9). When one contributory has paid more than another, the liquidator may properly make calls for the purpose of adjusting or equalising the rights of the contributories *inter se* (Companies Act, s. 133 (10); *In re Anglesea Colliery Co.*, 1866, L. R. 2 Eq. 379); and on the same principle a contributory in a voluntary winding up is entitled to see that the list of contributories is rightly settled, and for that purpose to inspect by his solicitor and accountant the books and documents of the company at all reasonable times on reasonable notice (*In re London Bank of Scotland*, W. N. 1867, 114). A registered shareholder cannot, after the commencement of a voluntary winding up, any more than after a winding up by the Court, rescind his contract to take the shares though voidable for fraud or misrepresentation (*Howe v. City and County Bank*, 1877, 3 C. P. D. 282), nor has a contributory in the voluntary winding up of a limited company any right to set off a debt due to him from the company against calls, whether such calls have been made by the directors before the voluntary winding up or by the liquidator after it (*In re Whitehouse & Co.*, 1878, 9 Ch. D. 595; *Black's case*, 1872, L. R. 8 Ch. 254). A liquidator may sign judgment against a contributory under R. S. C., 1883, Order 14 (*Government Security Co. v. Dempsey*, 1880, 50 L. J. Ch. 199).

By some strange oversight creditors of a company in voluntary winding up have no right given them to apply to the Court, the Legislature having, seemingly, assumed the solvency of companies winding up voluntarily. The result is that where a liquidator under a voluntary winding up disputes a claim a summons to consider it can only be taken out by the liquidator, not by the claimant. The claimant's course is to bring an action (*In re Poole Firebrick Co.*, 1873, L. R. 17 Eq. 268), but if by reason of the liquidator refusing to take out a summons to consider the claim the claimant is driven to such a course, *i.e.* to bring an action, the Court will restrain execution only on the terms of the creditor being allowed to prove for his judgment debt, interest, and costs, including the costs of the motion to stay. See also *Snyder Dynamite Co.*, W. N. 1893, 37. Apart from such special cases the Court has jurisdiction (under ss. 133, 138), and will generally exercise it to stay actions by creditors after a voluntary winding up has commenced (*In re Thurso Gas Co.*, 1889, 42 Ch. D. 486; *Westbury v. Twigg & Co.*, [1892] 1 Q. B. 77; *In re Sabloniere Hotel Co.*, 1866, L. R. 3 Eq. 75); but in staying an action the Court will give the creditor his costs of action down to the time

when he had notice of the winding up, and allow him to add such costs to his debt (*In re Keynsham Co.*, 1863, 33 Beav. 124; *Walker v. Banagher Distillery Co.*, 1876, 1 Q. B. D. 129; *Rose v. Garden Lodge Co.*, 1878, 3 Q. B. D. 235). In some cases for convenience the action will be allowed to proceed, an action under Lord Campbell's Act, for instance, or for diverting a stream (*In re Joseph Peace Co.*, W. N. 1873, 127). Interest on a debt of the company, stops running from the commencement of the voluntary winding up (*In re Imperial Land Co. of Marseilles*, 1871, L. R. 11 Eq. 499), but without prejudice to any claim if there are surplus assets. The rights of the landlord of a company in voluntary winding up have been much debated; but it would seem on the latest authorities that the landlord's right course is to prove if the company is insolvent (*Hardy v. Fothergill*, 1888, 13 App. Cas. 351; *Craig's Claim*, [1895] 1 Ch. 267; *In re New Oriental Bank Corpn.* No. 2, [1895] 1 Ch. 753). If the company is solvent it cannot of course compel its landlord to come in and prove the capitalised value of his claim for future rent (*Gooch v. London Banking Association*, 1886, 32 Ch. D. 41).

The liquidator in a voluntary winding up displaces the directors and becomes in their stead the agent of the company. The directors may still, however, with the liquidator's sanction, or the sanction of a general meeting, exercise their powers if necessary, for instance, a power of enforcing payment of calls by sale or forfeiture (*In re Fairbairn Engineering Co.*, [1893] 3 Ch. 450). As agent of the company, a voluntary liquidator is not personally liable in damages to a shareholder for delay in performing his duties—in distributing, for instance, the consideration, cash, and shares on a reconstruction under Companies Act, s. 161, if such delay was due to an honest error of judgment, and was not wilful or fraudulent (*Knowles v. Scott*, 1891, 64 L. T. 135). To assist his discretion the liquidator may in a voluntary winding up apply under sec. 138 to the Court to decide any question fairly arising in the winding up (*In re Union Bank of Kingston-on-Hull*, 1880, 13 Ch. D. 809), for example as to the compromise of a claim against the company (*Ex parte Miller*, 1866, L. R. 2 Ch. 692), adjusting rights of contributories (*In re Angelsca Colliery Co.*, 1865, L. R. 1 Ch. 555), determining the rights of different classes of shareholders to surplus assets (*In re Eclipse Gold Mining Co.*, 1873, L. R. 17 Eq. 490), proceeding against directors for misfeasance (*In re Bank of Gibraltar and Malta*, 1865, L. R. 1 Ch. 69), stay of winding-up proceedings (*In re South Barrule Slate Co.*, 1869, L. R. 8 Eq. 688), examination and discovery under sec. 115 (*Hersee's case*, 1880, 15 Ch. D. 139), stay of execution (*In re Poole Firebrick Co.*, 1873, L. R. 17 Eq. 268). The application should be by summons (*In re British Envelope Co.*, W. N. 1885, 84).

A liquidator in a voluntary winding up may exercise all the powers given by the Companies Act, 1862, to a liquidator under a winding up by the Court (see p. 217, *ante*). He may bring actions (*Huron's case*, 1880, 15 Ch. D. 139), serve a bankruptcy notice (*In re Winterbottom*, 1888, 18 Q. B. D. 446), compromise with creditors (Companies Act, s. 159) and contributories (s. 160), contract on behalf of company (*In re Anglo-Moravian Junction Rwy. Co.*, 1875, 1 Ch. D. 130), proceed against directors for misfeasance (*Rance's case*, 1870, L. R. 6 Ch. 104), obtain an examination order under Companies Act, s. 115 (*Huron's case*, 1880, 15 Ch. D. 142), summon meetings (Companies Act, s. 139), prosecute directors (Companies Act, s. 168), rectify the register (*Gilbert's case*, 1870, L. R. 5 Ch. 559), sell the company's property (Companies Act, ss. 133 (5), 95).

If a voluntary liquidator is guilty of misconduct he may be removed (Companies Act, s. 141; *In re Oxford Building and Investment Co.*, 1883, 49

L. T. 495), or proceeded against for misfeasance (*In re Llynvi and Tondy Co.*, 1889, 6 T. R. 12). If he has undistributed assets in his hands he may be ordered to pay them into the company's liquidation account (*In re Stock and Shares Auction Co.*, [1894] 1 Ch. 736).

Supervision Order.—Under sec. 147 of the Companies Act, the Court has jurisdiction to make an order directing the voluntary winding up to continue, but subject to the supervision of the Court. It is a matter of discretion, as to which the Court will have regard to the wishes of creditors and contributories (Companies Act, s. 149; *In re Bank of Gibraltar and Malta*, 1866, L. R. 1 Ch. 73; *In re New Oriental Bank Corpn.*, 1893, 41 W. R. 16). Only the company or a creditor or contributory can petition for a supervision order (*In re Pen-y-ran Colliery Co.*, 1877, 6 Ch. D. 477); but the Court will not make a supervision order on the petition of a contributory, unless the resolution for voluntary winding up has been unfairly obtained (*In re Beaujolan Mine Co.*, 1867, L. R. 3 Ch. 15), *à fortiori* if the petitioning contributory's shares are fully paid up (*In re Irrigation Co. of France*, 1871, L. R. 6 Ch. 176). As to a creditor's petition, see *In re Zoedone Co.*, 1883, 49 L. T. 654; *In re Chepstow Bobbin Mills Co.*, 1887, 36 Ch. D. 563). A supervision order leaves the liquidator free to exercise all the powers of a voluntary liquidator; it only provides means by which a creditor or anyone else can come to the Court and ask it to exercise its powers of supervision (*In re Westbourne Grove Drapery Co.*, 1878, 27 W. R. 37); but the applicant does so at his own risk as to costs (*In re New York Exchange Co.*, 1888, 39 Ch. D. 419). The Court will only exercise its power of control under a supervision order when applied to, to do so (W. N. 1866, 327). The Court in making a supervision order may appoint an additional liquidator (Companies Act, s. 150). A supervision order operates like a winding-up order as a stay of actions and executions (Companies Act, ss. 151, 148). A voluntary winding up is no bar to a creditor having the company wound up by the Court, if the Court is of opinion that the rights of the creditor will be "prejudiced by a voluntary winding up" (Companies Act, s. 145). See as to this, *In re New York Exchange Co.*, 1888, 39 Ch. D. 415; *In re Taurine Co.*, 1883, 25 Ch. D. 140; *In re Gold Co.*, 1879, 11 Ch. D. 710.

Stay of Winding-up Proceedings.—The Court has jurisdiction, under ss. 89, 138 of the Companies Act, to stay all proceedings in a voluntary winding up on the petition of the liquidator (*In re Steamship Titian Co.*, 1888, 36 W. R. 347; *In re Hafna Mining Co.*, 1888, 84 L. T. N. 403).

Dissolution of Companies—After Winding up by Court.—When the affairs of a company have been completely wound up, the Court makes an order that the company be dissolved, and the registrar enters the order in his books.

After Voluntary Winding up.—In the case of a voluntary winding up, the liquidator calls a meeting of the company by advertisement, lays before it an account of the liquidation, and makes a return of such meeting having been held to the registrar; three months after which the company is dissolved.

Apart from fraud, the Court has no jurisdiction when a company has been dissolved to make a winding-up order, reopening the whole matter (*In re Pinto Silver Mining Co.*, 1878, 8 Ch. D. 273; *In re Westbourne Grove Drapery Co.*, 1878, 27 W. R. 37; *In re Crookhaven Mining Co.*, 1866, L. R. 3 Eq. 69; *In re Schooner Pond Coal Co.*, 1888, 84 L. T. N. 401).

Striking Name of Company off Register.—Names of companies believed by the registrar to be defunct may, after inquiry, be struck off the register

(Companies Act, 1880, s. 7); but the Court has power to restore a name (*In re Outlay Assurance Society*, 1887, 34 Ch. D. 479; *In re Carpenter's Patent Boat Co.*, 1888, 1 Meg. 26; *In re Estates Investment Co.*, 1883, 27 Sol. J. 585).

[*Authorities.*—Lindley on *Companies*, 5th ed.; Buckley on *The Companies Act*, 7th ed.; Chadwyck Healey, *Joint-Stock Companies*, 3rd ed.; Palmer, *Company Precedents and Winding-up Forms*, 6th ed.; Manson, *Law of Trading and other Companies*, 2nd ed.; Thring, *Joint-Stock Companies*, 5th ed.; Brice on *Ultra Vires*, 3rd ed.; Hurrell and Hyde on *Directors*; Hamilton on *Directors*.]

Compensation is the word usually applied by lawyers to the satisfaction to be made to persons whose rights are interfered with or whose property is taken away in the exercise of statutory powers. By the common law of England, as stated by Mr. Ingram in the introduction to his book on the *Law of Compensation*, “no violation of the rights of private property is allowed even for the general good of the whole community. The principle—that the good of the individual should yield to that of the community—has in this country never been received with favour. And no tribunal of the judicature has ever been intrusted with the power of compelling a sale of land or dispossessing a citizen of his house or premises even for public purposes of great and manifest utility.”

An Act of Parliament is the only method by which public bodies and promoters of undertakings can obtain those rights of interfering with private property; and the terms on which such rights are usually granted are that full compensation should be made to the persons whose property is either taken away from them or is injuriously affected.

But it is necessary, for the good of the community, that undertakings of great public utility should not be stopped or crushed by the opposition of individuals; and although hardship in some cases may be and is inflicted by the carrying out of such undertakings, still, for the good of the public, private owners are compelled to accept a monetary compensation for any loss or injury they may have suffered. Before the Acts which were passed in the year 1845, the method of ascertaining this compensation was provided for by the insertion in each Act of Parliament of what were then known as “common clauses”; but as time went on it was found that this practice was open to considerable abuse and caused great expense. Every ingenuity was used in making various alterations in the wording of the clauses of the bills then promoted, the object of which, though not always apparent, was to gain some advantage in the terms upon which the compulsory powers were granted; and this led to an Act being passed called “The Lands Clauses Consolidation Act, 1845” (8 Vict. c. 18), the introductory words of which are worth quoting, because they show very clearly the reasons for the Act and the state of affairs which then existed. The preamble is as follows:—“Whereas it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves: may it therefore please,” etc.

There were other Acts also of a similar nature passed about the same time, and some one or more of these Acts are now by reference incorporated,

in whole or part, as the case may require, into all Acts of Parliament which, if passed before 1845, would have required similar provisions to be inserted in each of them. By the passing of these Acts in 1845 the saving in printing alone, apart from other savings, was therefore enormous.

Other Acts passed about that time for the purpose of defining the basis and methods of acquiring private rights and for making compensation therefor are the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20; the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17; the Markets and Fairs Clauses Act, 1847, 10 & 11 Vict. c. 14; the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27; the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34.

Numerous private and public Acts have since been passed which it is needless to enumerate, but a short description of the Lands Clauses Consolidation Act, 1845, is desirable.

The parties who have obtained a right, by Act of Parliament, to execute any works or undertaking, whether company, undertakers, commissioners, trustees, corporations, or private persons, are called the promoters; and the owner is understood to mean any person or corporation who is enabled to sell and convey land to the promoters. "Land" also under the Act has a wide meaning, extending as it does to messuages, tenements, and hereditaments of any tenure.

The first power of the promoters is to purchase land by agreement for a consideration in money, though it may be either a gross sum or an annual rent-charge.

The second and chief power of the promoters is to purchase land otherwise than by agreement, and this naturally requires a special procedure.

The procedure is as follows:—The promoters, before they can take land compulsorily, are required to give what is called a notice to treat, that is, a notice in which they must specify the lands which they require to purchase; and they must also demand the particulars of the estate and interest of the owner, and of the claims made by him; and, besides this, they must state that they are willing to treat for the purchase of the land, and as to compensation to be made to all parties for the damage that may be sustained by reason of the execution of the works.

The effect of a notice to treat is somewhat difficult to define, but, practically speaking, directly the promoters get their Act passed, all the lands mentioned in the Act are deemed to be under offer to the promoters, and the notice to treat is a kind of acceptance of the offer by the promoters, subject to a price being agreed upon or fixed by one of the various tribunals prescribed by the Lands Clauses Acts. The notice does not establish an actual contract until the amount of compensation is settled, but certain relations of vendor and purchaser exist.

Upon receiving a notice to treat, an owner may do one of three things—he may state the particulars of his claim, he may not do so, or he may give a counter-notice.

The necessity for a counter-notice arises in cases where the promoters have given a notice to treat in respect of only a part of the owner's property, and the owner claims that the promoters must take the whole or none.

The owner's rights in this respect are conferred by sec. 92, which provides that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." What is or is not a house, other building, or manufactory

has received various judicial interpretations, but no definition can well be made which would apply to every case.

The word "house" includes the house, garden, curtilage, outhouses, and everything which is necessary for the enjoyment or beneficial occupation of the house, but this is too wide a definition, for a stable and gardens on the opposite side of a road were held not to be part of the house. The word "house" is used rather in its legal sense, and includes everything which would naturally be implied as passing with the house on a sale of "the house." One house, from its size and importance, might have attached to it and require, for its proper use and enjoyment, much more land than a smaller house, and, while the land thus attached might pass with a sale of the house, outlying fields would not so pass.

A "manufactory" may be land or buildings, or both. The question to be considered is what the land or buildings are used for by the owner. The manufactory may be on two sides of a road, but if the two sides are indispensable parts of the whole, they would both come under the word "manufactory."

The effect of the counter-notice is to suspend the notice to treat by the owner saying in effect to the promoters, "Your notice to treat is bad; my property under your Act is under offer to you as a whole; you can take the whole but not the part."

These and other difficulties and disputes which arise between the promoters and the owner, apart from the assessment of compensation, must be determined by the High Court; the only powers which the various tribunals have under the Lands Clauses Act is to assess the amount in cases of disputed compensation.

These tribunals consist of justices, arbitrators, a jury, and a surveyor appointed by justices, and they have jurisdiction in the following cases:—

(a) *Justices*.—(1) When the claim exceeds £50; (2) when the claimant has no greater interest than a tenant for a year.

(b) *Arbitration*.—(1) When the claim exceeds £50, and the claimant desires arbitration; (2) when the amount has been ascertained by a surveyor (as hereinafter mentioned), and the claimant is dissatisfied; (3) when superfluous lands are to be sold, and the former owner and promoters do not agree as to price.

(c) *Jury*.—(1) When the claim exceeds £50, and the claimant does not signify his desire to have arbitration, or when the claim has been arbitrated upon but no award has been made within the time limited; (2) when the claim exceeds £50, and the claimant gives notice in writing of his desire to have the same settled by a jury.

(d) *Surveyor appointed by Justices*.—(1) When an owner cannot be found, or is absent from the kingdom, or does not appear at the time appointed; (2) when the claim is in respect of commonable rights, and a committee has not been appointed to treat with the promoters.

The Lands Clauses Acts further contain elaborate provisions for the procedure before such tribunals, as well as methods for the appointment of an arbitrator in the case of the appointed arbitrator dying or refusing to act.

The promoters are not allowed to enter upon lands, except to make a survey, unless they make a deposit and give a bond in the manner prescribed by the Act. The deposit then has to remain as security, and to be applied under the direction of the Court.

There are other provisions for the enfranchisement of copyholds and the purchase of common lands, and the rights of commoners thereon. These latter rights are ascertained by convening a meeting of the parties inter-

ated, and the meeting is required to appoint a committee to treat with the promoters. If disputes arise between the committee and the promoters, the claims are settled in the same way as in other disputed cases of compensation; but if no committee is appointed, the amount of the claim has to be settled by a surveyor.

In the space of a short article it is impossible to enumerate all the various kinds of compensation to which the Lands Clauses Acts are made applicable, but these and other contemporaneous Acts provide also for compensation for injury to mines, streams, and for injury by the temporary occupation of lands, making gas works, laying sewers, draining land, electric lighting, telegraph works, and for injury caused to owners by the abandonment of an undertaking, as, for instance, for the loss incurred in payment of the costs and fees of solicitors and surveyors employed by the owner after receipt of a notice to treat.

When lands are taken the compensation may include equitable as well as legal interests, damage for severance, and for injurious affection of other land held therewith. The basis of value is the value to the owner, and upon this principle the value of the goodwill, if the property taken is a business, may be assessed, as well as the loss of profits and the damage caused by expulsion. Prospective value is also an element of value.

Compensation may also be recovered when no land is taken, but the compensation in such cases is limited to injury to land, or any right incident thereto caused by the execution (not the use) of the works comprised in the undertaking.

There is no provision in the Lands Clauses Acts for a set-off by the promoters for the increased value to the owner by the execution of the works comprised in the undertaking, but the principle of betterment is fast gaining favour in this country, and it is very probable that before long considerable changes will be effected in the practice of the assessment of compensation. See LANDS CLAUSES, where authorities are given.

Compensation (for Assisting in Capture of Felons).—See FELONS and REWARD.

Competence is the equivalent in foreign law to "jurisdiction" in English.

The terms are practically interchangeable, the difference being that jurisdiction in English relates upwards from the matter to the Court, while competence in French relates downwards from the Court to the matter before it. (See JURISDICTION.)

Compilation.—See COPYRIGHT.

Complaint.—1. An allegation that a wrong has been done, or a grievance suffered. This term is most generally used in law with reference to Courts of summary jurisdiction, to describe the mode in which proceedings are to be instituted to obtain an *order* for the payment of money or otherwise, and to distinguish them from proceedings "on information," with a view to obtain a *conviction*. Such proceedings cannot legally be instituted unless a complaint has been made and a summons to the defendant issued

thereon. The complaint need not be either in writing or on oath, unless required to be so by the particular enactment upon which it is framed (11 & 12 Vict. c. 43, ss. 8, 10). It must be made by the person aggrieved, or his counsel or solicitor, or by some person authorised on his behalf, and must be made within six months from the time when the cause of complaint arose, unless a longer or shorter period is prescribed or allowed by the statutes under which it is made (11 & 12 Vict. c. 43, ss. 10, 11), or it is made in respect of a continuing cause of complaint (*London County Council v. Worley*, [1894] 2 Q. B. 826). See CONTINUING ACT.

Roughly speaking, "complaints" are confined to claims of a civil or quasi-civil character, which could not be described as "criminal causes or matters" within the Supreme Court of Judicature Act, 1875 (*R. v. Kerswill*, [1895] 1 Q. B. 1). They do not include applications to justices under sec. 22 of the Lands Clauses Act, 1845 (*R. v. Edwards*, 1884, 13 Q. B. D. 589); nor proceedings to enforce a rate (*Sweetman v. Guest*, 1867, L. R. 3 Q. B. 262; *Seaman v. Burley*, [1896] 2 Q. B. 344). But in the case of a complaint made with a view to obtain a warrant to seize books under the Obscene Publications Acts, 1857, 20 & 21 Vict. c. 83, the proceeding was held to be essentially criminal, and not to abate by the death of the person who instituted it (*R. v. Truelove*, 1879, 5 Q. B. D. 336).

Defects in a complaint or in a summons issued thereon, and variances between a complaint or summons and the evidence adduced at the hearing, cannot be made a ground of objection, but if calculated to prejudice the defendant may be made ground for adjournment of the case by the Court (11 & 12 Vict. c. 43, s. 1).

The forms of complaint and summons now in use are scheduled to the Summary Jurisdiction Rules of 1886 (St. R. & O., Rev., vol. vi. p. 444). They must be confined to *one* cause of complaint (11 & 12 Vict. c. 43, s. 10); but non-compliance with this rule is merely a ground for making the complainant confine himself at the hearing to a single charge, which he could have made without a written complaint (*R. v. Johnson*, 1896, 31 L. J. N. 703). But he cannot, without the defendant's assent, substitute, for a matter included in the summons, one not so included (see *R. v. Brickhall*, 1864, 33 L. J. M. C. 156; *Egginton v. Pearl*, 1875, 33 L. T. 428).

No warrant can be issued on a complaint when it is first applied for (11 & 12 Vict. c. 43, s. 2); but only a summons which must be served on the defendant personally, or left in original or duplicate for him with some person at his last or usual place of abode, in England or Wales, at a reasonable time before the hearing, unless a minimum period is prescribed as to the particular complaint. The service must be effected a reasonable time before the day fixed for its return. It need not be effected by a police officer. If personal service is not effected, the summons must be explained to the person with whom it is left for the defendant (*R. v. Smith*, 1875, L. R. 10 Q. B. 604; and cp. *Holloway v. Coster*, [1897] 1 Q. B. 346). It can be served without indorsement in any part of England and Wales outside the local jurisdiction of the issuing justice, and in Scotland after indorsement by a Court of summary jurisdiction there, unless it is a complaint for a civil debt (42 & 43 Vict. c. 49, s. 6; 44 & 45 Vict. c. 24, s. 4); or a bastardy summons (*Berkeley v. Thompson*, 1885, 10 App. Cas. 45). In certain cases the mode of service of a complaint is prescribed by the statute on which it is founded, e.g. the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25); the Bastardy Acts (*R. v. Farmer*, [1892] 1 Q. B. 637; *R. v. Webb*, [1896] 1 Q. B. 487); and see the provision as to service on joint-stock companies (8 & 9 Vict. c. 16, s. 135; 25 & 26 Vict. c. 89, s. 2).

Hearing.—Neither party need be present at the hearing of the complaint; but either may be represented by counsel or solicitor. If the defendant does not appear, and is not so represented (*Bissell v. Wilson*, 1843, 1 El. & Bl. 489), proof of service of the summons is given either by calling the person who served it, or by his declaration made under 42 & 43 Vict. c. 49, s. 41. (For form, see S. J. Rules, 1886, St. R. & O., Rev., vol. vi. p. 444.) The justices can then proceed *ex parte*, or on filing of a written complaint verified by oath; and in the case of a summons served in Scotland, on being satisfied that there is a *prima facie* case, may issue a warrant for the defendant's arrest (11 & 12 Vict. c. 43, s. 13; 44 & 45 Vict. c. 24, s. 4). But a warrant cannot be issued against a person who fails to appear to answer a complaint for non-payment of money, except when the payment is under a bastardy order (42 & 43 Vict. c. 49, ss. 35, 54). If the defendant appears voluntarily or under warrant, or is represented, and the complainant does not appear personally, and is not represented, the complaint may be dismissed or the case adjourned (11 & 12 Vict. c. 43, s. 13). If both parties appear or are represented, the hearing proceeds in accordance with the provisions of secs. 14, 15 of the S. J. Act, 1848. The defendant is a competent witness in all cases where an order for payment of money only is sought, or an order for the doing of an act which the defendants can be required to perform, *i.e.* where the proceeding is in substance of a civil and not of a criminal character (see *R. v. Berry*, 1859, Bell's C. C. 46; Taylor on *Evidence*, 8th ed., s. 1358).

The Court on making or refusing an order may direct the unsuccessful party to pay the costs of the successful; and if a complaint is dismissed, the defendant is entitled, on demand, to receive a certificate of dismissal.

The costs awarded on dismissal are recoverable by judgment summons as a civil debt (*Ex parte Boaler*, [1893] 2 Q. B. 146). Where an order is made on the defendant to pay money, it is enforceable by distress, but not by imprisonment, unless there is evidence that the defendant has the means to pay and will not pay (32 & 33 Vict. c. 62, s. 5; 42 & 43 Vict. c. 49, ss. 6, 9, 35). Where the orders are made under Acts subsequent to 1879 to do or abstain from any act other than the payment of money, as a general rule, subject to exception by any express provisions, the justices can prescribe the mode of enforcing the order, and impose, in case of default, a penalty of so much *per diem* till obedience, which is recoverable as a civil debt (42 & 43 Vict. c. 49, ss. 34, 51). (For form of order, see S. J. Rules, 1886; St. R. & O., Rev., vol. vi. p. 444.)

No appeal on fact or law lies to Quarter Sessions against an order made on complaint unless specifically given by statute. (See APPEALS (to Quarter Sessions).)

The decisions of the justices on points of law are open to review by case stated under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33; and as the proceedings on complaint are of a civil nature, an appeal by leave lies to the Court of Appeal for the decision of the High Court on the case stated. (See SPECIAL CASE.)

[*Authorities.*—See Atkinson, *Mag. Ann. Pr.*, 1897; Stone, *Justices' Manual*, 30th ed.; Glen, *Summary Jurisdiction Acts*, 6th ed., by Gill & Douglas.]

2. "Complaint" is sometimes used in a different sense from that in which it appears in the Summary Jurisdiction Acts, *e.g.* in sec. 42 of the Offences against the Person Act, 1861, where it is employed in the ordinary sense of allegation of a grievance, and not as substituting "information" for "complaint"; and in sec. 3 of the Clergy Discipline Act, 1840.

3. It is also used of extra-judicial statements as to the commission of an

offence; especially with reference to offences against the chastity of women. Special importance is laid, as matter of evidence, on information given by a woman as to an offence against her, given without delay after its commission. Such information may be placed before the jury not as evidence of the facts stated by the complainant, but as evidence of the consistency of her conduct with the evidence given by her before the jury and as negating consent (*R. v. Lillyman*, [1896] 2 Q. B. 167).

Compos mentis (non).—See LUNACY.

Compound Householder.—Where the owners of small houses themselves pay the rates, and receive a composition from the occupiers in respect of the rates so paid, legislation has enabled such occupiers to retain the parliamentary franchise (one of the qualifications for which is the payment of poor-rate) by demanding to be rated to the poor-rate, and thereupon being placed upon the rate. Householders so demanding to be rated are commonly known as "Compound Householders," see the Compound Householders Act, 1851, 14 & 15 Vict. c. 14, which is intitled "An Act to amend the law for the registration of certain persons commonly known as Compound Householders, and to facilitate the exercise by such persons of their right to vote in the election of borough members to serve in Parliament."

Sec. 30 of the Representation of the People Act, 1832, 2 & 3 Will. iv. c. 45, provides that in every city or borough returning a member or members to Parliament, and in every place sharing in the return for such city or borough, any person occupying any house, warehouse, counting-house, shop, or other building, either separately or jointly with any land occupied therewith as owner, or occupied therewith by him as tenant under the same landlord, in any parish or township in which there is a rate for the relief of the poor, may claim to be rated to the poor-rate in respect of such premises, whether the landlord is or is not liable to be rated to the poor-rate in respect thereof; and, upon such occupier so claiming and actually paying or tendering the full amount of the rate, if any, then due in respect of such premises, the overseers of the parish or township in which such premises are situate are required to put the name of such occupier upon the rate for the time being; and in case such overseers neglect or refuse so to do, such occupier is nevertheless for the purposes of the Act to be deemed to have been rated to the poor-rate in respect of such premises from the period at which the rate was made in respect of which he so claimed to be rated. By the Parliamentary Electors Registration Act, 1868, 31 & 32 Vict. c. 58, s. 30, this provision was applied to all occupiers of premises capable of conferring the franchise for a county under the Representation of the People Act, 1867, 30 & 31 Vict. c. 102. See also the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 9, and the Representation of the People Act, 1884, 48 Vict. c. 3, s. 9.

The inconvenience of being obliged to make continual claim in respect of each rate resulted in many persons being deprived of the franchise. To obviate this the Compound Householders Act, 1851, enacted (s. 1) that occupiers having once claimed to be rated in respect of premises and paying rates need not make any further claim with regard to future rates, but shall be entitled to be registered as voters, provided that the requirements as to occupation are satisfied, and that the rates have been paid. The liability of

every person so claiming, who is registered as a voter in respect of the premises to which the claim relates, is to continue so long as he occupies the premises and remains on the register (s. 2), and, in case of a composition with the landlord in respect of the rate, the liability of the occupier is to be limited to the amount of the composition (s. 3). See also the Assessed Rates Act, 1879, 42 & 43 Vict. c. 10.

It was formerly a common practice for landlords of houses of small value to compound for the poor-rate at a lower rate than an ordinary occupier would pay; this was abolished, except as to dwelling-houses or tenements wholly let out in apartments or lodgings not separately rated, by sec. 7 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102. The practice was, however, revived by the Poor Rate Assessment and Collection Act, 1869, 32 & 33 Vict. c. 41, which enabled the owners of small tenements to be rated instead of the occupiers, and a deduction to be allowed them from the rate. The occupier is entitled to pay the rate in default of the owner doing so, and to deduct the amount so paid from the rent due from him to the owner. Sec. 7 of that Act provides that every payment of a rate by the owner, whether he is himself rated, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, is to be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends on the poor-rate. Under sec. 19 the name of the occupier is to be inserted in the rate-book in all cases, whether the rate is collected from the owner or the occupier, and such occupier is to be deemed to be duly rated for the purpose of the franchise, and his right to the franchise is not to be affected by the wrongful omission of his name from the rate-book. See also the Parliamentary and Municipal Registration Act, 1878, s. 14.

The effect of the statutes is to place the occupier of a rateable tenement, where the landlord is rated, in the same position, so far as rating is concerned, as if the occupier had been rated, and this is so also in the case of the occupier of a portion of a dwelling-house (*Bradley v. Baylis*, 1881, 8 Q. B. D. 210). In short, the result of the legislation is that payment of the poor-rate, or of a composition in respect thereof, by the owner or by the occupier, will qualify the occupier for the franchise.

[*Authorities*.—See, further, Rogers on *Elections*, part i. Registration, 15th ed.]

Compromise.—"A compromise takes place when there is a question of doubt, and the parties agree not to try it out, but to settle it between themselves by a give and take arrangement" (per Kay, L. J., in *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273). As to the power of counsel and solicitors to compromise an action, see titles ADVOCATE and SOLICITOR.

The terms of the compromise of an action may be made a rule of Court, and enforced accordingly, if one of the terms is that this can be done (see *Graves v. Graves*, 1893, 69 L. T. 420); in *Smythe v. Smythe*, 1887, 18 Q. B. D. 544, an agreement of compromise entered into in the Divorce Division was made an order of Court in the Queen's Bench Division.

An application to set aside a compromise cannot be made by summons in the particular action; a fresh action must be instituted; but to succeed in such an action very strong grounds must be shown, e.g. fraud, or the parties not being *ad idem*.

Comptables.—A technical term used in the old French law of Lower Canada, denoting officers who received and were accountable for the king's revenues. The term is still retained with the same meaning in article 1994 of the Civil Code of Lower Canada (see *Exchange Bank of Canada v. R.*, 1885, 11 App. Cas. 157).

Compter or Counter (*Comptoir, Computatorium*).—The prison attached to the Court of justice of the mayor and (or) sheriffs of a borough. The Poultry Compter and the Wood Street Compter were the prisons for the Sheriffs' Courts of the City of London, now merged in the City of London Court. See LONDON (CITY).

Comptroller (Controller).—The term comptroller or controller signifies, in its widest and most general sense, one who examines and verifies the accounts of collectors of public money. There was a "comptroller in bankruptcy" under the Bankruptcy Act, 1869 (ss. 55–58), whose duty it was to receive and examine the accounts of trustees. The "comptrollers of the Hanaper" were officers of the old Court of Chancery, whose offices were abolished by 5 & 6 Vict. c. 103. As to the appointment and function of the Comptroller of the Patent Office, see PATENTS.

Compulsory Powers.—On the ground of public utility Parliament frequently confers power on the promoters of undertakings of a public nature, such as railways, canals, etc., to take compulsorily for the purposes of such undertakings the lands of private persons on making proper compensation for the same. Prior to the year 1845 it was the practice to insert compulsory powers at length in each Act authorising such undertakings, but as the clauses conferring these powers were practically identical in each case, Parliament embodied them in a general Act, called the Lands Clauses Act, 1845, which accordingly is incorporated in every statute for the carrying out of which it may be necessary to acquire land compulsorily. Such powers, which can only be put in force when the capital of the undertaking has been fully subscribed (s. 16), must be exercised within the time prescribed by the special Act, or if no time is there prescribed, within three years of its enactment (s. 123). A notice to treat (see NOTICE TO TREAT) under sec. 18 is the first step to be taken by the promoters to have the amount of compensation to be paid for the land taken fixed (see COMPENSATION); and it has been decided that if this notice has been served within the prescribed period, the necessary steps for the completion of the purchase may be taken, although the prescribed time has expired (*Tiverton and North Devon Ry. v. Loosemore*, 1884, 9 App. Cas. 480). See COMPULSORY PURCHASE; and LANDS CLAUSES.

Compulsory Purchase.—As has been pointed out in the article on COMPULSORY POWERS (*supra*), companies are frequently given power to acquire land compulsorily for the purposes of their undertakings. For carrying out such purposes elaborate machinery has been provided by the Lands Clauses Act, 1845, to which reference must necessarily be made for details; here, it is only possible to refer very briefly to the procedure there provided.

A notice to treat (see NOTICE TO TREAT) under sec. 18 is the first step to be taken by promoters who intend to put in force their compulsory powers. This notice must be served on the various parties interested in the lands proposed to be taken, and must demand from them particulars of their interests and of the claims they intend to make in respect thereof. It may be stated that the land in respect of which notice is served must really be required for the purposes of the undertaking, as promoters cannot be permitted to exercise their compulsory powers for any collateral object (*Galloway v. London (Mayor)*, 1866, L. R. 1 H. L. 34).

If, for twenty-one days after the service of the notice to treat, any party interested in the land fails to state the particulars of his claim, or to treat in respect of the same, the amount of compensation to be paid for the land taken is to be settled in the manner provided by the Act (s. 21). The procedure for determining this varies according to the wishes of the parties and the amount claimed; sometimes the amount is settled by justices, sometimes by a surveyor appointed by them, sometimes by arbitration, and sometimes by a jury (see ss. 22-80 of the Act, and title COMPENSATION).

A person is not bound to sell a part of his house, or other building or manufactory, if he is willing and able to sell the whole of it (s. 92), and owners of small pieces of land left by the intersection of their property, may insist upon the promoters taking these small pieces (s. 93); while, on the other hand, the promoters may insist upon taking them, if the cost of doing so would be less than that of making any necessary bridges or culverts (s. 94).

Provision is made by the Act for dealing with the case of copyholds, common lands, and with the case of parties having only limited interests, or where they refuse to convey, or do not show a good title, or where they cannot be found; and for the costs of conveyances, deposits and petitions for payment out.

The promoters are not entitled, except for the purposes of surveying and taking levels, etc., to enter upon land before paying the price thereof (s. 84), unless they make a deposit and give a bond by way of security for the amount claimed (ss. 85-88). See LANDS CLAUSES.

Compulsory Registration.—Registers of deeds have long been established in Middlesex, Yorkshire, and the district known as the Bedford Level (*q.v.*). A registry was established for Middlesex by 7 Anne, c. 20; but in 1891, by the Land Registry (Middlesex Deeds) Act of that year this registry was transferred to the office of the land registry established under the Land Transfer Act, 1875. For Yorkshire, registers were established by various statutes of Anne and George II., which, however, have been replaced by the Yorkshire Registries Acts, 1884 and 1885. The Bedford Level Registry was established by 15 Car. II. c. 17.

In Yorkshire assurances have priority according to the date of their registration, and the same applies in Middlesex, subject to this, that a purchaser or mortgagee, with notice of a prior unregistered deed affecting the same land, gains no priority over same by registering first. In the Bedford Level registration is in terms compulsory.

See MIDDLESEX REGISTRY; YORKSHIRE REGISTRY; LAND TRANSFER.

Compurgation.—1. *Compurgatio canonica* was a form of procedure in criminal cases derived from the canon law. It was employed in the English ecclesiastical Courts, in which a clerk over whose offence the

Court claimed cognisance was usually put to his purgation, *i.e.* to calling a certain number of other clerks to swear to his character or innocence. By the time of Edward I. the common law Courts had put a stop to these proceedings (1 Pollock and Maitland, *Hist. Eng. Law*, 426, 427) as farcical and an impediment to civil justice.

2. The term compurgation properly applies to these ecclesiastical proceedings only. But until the establishment of trial *in pais* before a petty jury, a similar procedure, derived from old Teutonic or Anglo-Saxon law, was employed in the lay Courts as an alternative to the ordeal or wager of battle. In the lay Courts a man was said to wage his law (*vadiare legem suam*) or purge himself by oath-helpers (*consacramentales* or *eideshülfe*). The procedure was in use both in civil and in criminal cases. In the former it long survived in actions of detinue and of debt on a document not under seal, and was used as late as 1824 (*Ring v. Williams*, 2 Barn. & Cress. 538), and not abolished till 1833 by 2 & 3 Will. IV. c. 42, s. 13 (2 Pollock and Maitland, *Hist. Eng. Law*, 212, 599, 631). In criminal cases it preceded jury trial, and survived as its alternative, especially in boroughs and franchises such as the city of London (2 Pollock and Maitland, *Hist. Eng. Law*, 631).

The man who waged his law had to swear an oath of innocence backed by a number (usually eleven) of oath-helpers or compurgators, at first kinsmen, who swore to the best of their knowledge and belief that the oath of the accused was true. Ultimately the compurgators became mere witnesses to character, and were not accepted in contradiction of manifest facts, and by the fourteenth century had given way to trial by jury on evidence (2 Pollock and Maitland, *Hist. Eng. Law*, 598, 631).

[*Authorities*.—See 3 Black. Com. 343; Ducange, *s.v.* "Juramentum"; 1 Stephen, *Hist. Crim. Law*, 68.]

Computation of Time.—See TIME.

Concert, European.—A term used to describe a joint understanding between the Great Powers of Europe. Though it seems to have come into use only recently, there have been many instances of such joint action during the present century, chiefly in connection with events in Eastern Europe and the preservation or joint dismemberment of Turkey.

The term has only come into use recently, the institution which it describes having begun to be felt about the time of the fall of Napoleon. During the preceding century it was the aim of all the most far-seeing European statesmen to preserve the *status quo*, but we find no concerted measures to that end. The first occurs in 1813, when Metternich, to whom more than to anyone else belongs the honour of founding and promoting a system since found to be so powerful an influence in the cause of peace, persuaded the Emperor Francis II. to invoke European support in furtherance of his claim to the throne of France in behalf of his grandson. Of joint action in Eastern Europe with which the European Concert is now chiefly identified, the first instance was in 1826–1827, when the nations of Europe combined to prevent war between Turkey and Greece. That they were not ultimately successful is immaterial; it established the principle which has ever since been recognised.

Mr. Gladstone in 1880 stated that "our main hope for putting down disturbances, aggrandisements, and selfish schemes in Europe depends upon maintaining the common accord, or what commonly is called the Concert of

Europe." Lord Salisbury, in the House of Lords on 19th March 1897, gave the following description of it: "I feel it is our duty to sustain the federated action of Europe. I think it has suffered by the somewhat absurd name which has been given to it—the Concert of Europe—and the intense importance of the fact has been buried under the bad jokes to which the word has given rise. But the federated action of Europe—if we can maintain it—is our sole hope of escaping from the constant terror and the calamity of war, the constant pressure of the burdens of an armed peace which weigh down the spirits and darken the prospects of every nation in this part of the world. The federation of Europe is the only hope we have; but that federation is only to be maintained by observing the conditions on which every Legislature must depend, on which every judicial system must be based—the engagement which it enters into must be respected" (*Times*, March 20, 1897).

Concession.—A term used to describe a grant made by a central or local public authority to a private person or persons for the utilisation or working of lands, an industry, railway, waterworks, etc. Though such concessions are governed by the internal law of the State in or by which the grant is made, representations have frequently been made by foreign States on behalf of their subjects to whom concessions have been granted. The law of nations, unless a treaty right has been infringed, or the rules of humane conduct recognised by civilised mankind are infringed, does not, however, sanction any such interference.

Concessit Solvere.—A count *sur concessit solvere* (he agreed to pay) is customary in the Mayor's Court of London and the Bristol Tolzey Court, in which the common law system of pleading survives, and is that most commonly used either with or without other counts. It is specially in vogue because it is not beset with the technicalities which attend *indebitatus* counts, and because under it the plaintiff can simultaneously claim for any demand of a liquidated nature, such as work done, goods sold, money received to the plaintiff's use, bills of exchange, or promissory notes, etc. It probably came into use because the agreement within the city of London or other franchise having its own Court of record to pay the sum claimed, on which it is founded, gave jurisdiction in cases in which the original liability of the defendant was not within the local jurisdiction of the Court. The defence to this count is by plea of "never indebted."

[*Authorities.*—See Glyn and Jackson, *Mayor's Court Practice*, 2nd ed., pp. 16, 39–42, 98, 99, and for form of count, p. 186; also *MAYOR'S COURT*.]

Conciliation.—The Conciliation Act, 1896, 59 & 60 Vict. c. 30, repealing earlier enactments of a similar character (the Masters and Workmen Arbitration Act, 1824, the Councils of Conciliation Act, 1867, and the Arbitration (Masters and Workmen) Act, 1872), provides machinery for the prevention and settlement of trade disputes. Its substance may be summarised as follows:—

Registration and Powers of Conciliation Boards.—Any board established before or after the passing of the Act (7th August 1896), constituted for the purpose of settling disputes between employers and workmen by conciliation and arbitration, and any association or body authorised by an

agreement in writing made between employers and workmen to deal with such disputes, may apply to the Board of Trade for registration under the Act as a "conciliation board" (s. 1 (1)). The application is to be accompanied by copies of the constitution, by-laws, and regulations of the conciliation board, with any other information the Board of Trade may require (*ibid.* (2)). A register of "conciliation boards" is kept by the Board of Trade, and any conciliation board may have its name removed from the register on sending to the Board of Trade a written application to that effect (*ibid.* (3)). Such a removal may also be made by the Board of Trade if satisfied that a registered "conciliation board" has ceased to exist or to act (*ibid.* (5)). Every registered "conciliation board" is to furnish such returns, reports, etc., as the Board of Trade may require (*ibid.* (4)); and, subject to any agreement to the contrary, proceedings for conciliation before a registered board are to be conducted in accordance with the regulations of the Board in that behalf (*ibid.* (6)).

Powers of Board of Trade as to Trade Disputes.—Where a difference exists or is apprehended between an employer or any class of employers and workmen, or between different classes of workmen, the Board of Trade may (a) inquire into the causes and circumstances of the difference; (b) take such steps as to the Board seem fit for the purpose of enabling the parties to the difference to meet together by themselves or their representatives under the presidency of a chairman mutually agreed upon or nominated by the Board of Trade or by some other person or body, with a view to the amicable settlement of the difference; (c) on the application of employers or workmen interested, and after taking into consideration the existence and adequacy of the means available for conciliation in the district (sec. 4 gives power to the Board of Trade to aid in establishing conciliation boards) or trade, and the circumstances of the case, appoint a person or persons to act as conciliator or as a board of conciliation; (d) on the application of both parties to the difference, appoint an arbitrator (s. 2 (1)). A conciliator so appointed is to inquire and report to the Board of Trade (*ibid.* (2)). If a settlement is effected by conciliation or by arbitration, a memorandum of its terms is to be drawn up and signed by the parties or their representatives, and a copy is to be delivered to and kept by the Board of Trade (*ibid.* (3)).

The Arbitration Act, 1889 (see ARBITRATION), does not apply to the settlement by arbitration of disputes under this Act. Such proceedings are to be conducted in accordance with such provisions of the Act of 1889, or such regulations of any conciliation board as may be mutually agreed upon between the parties (s. 3). The Board of Trade is from time to time to report its proceedings under this Act to Parliament (s. 5), and its expenses, incurred in the execution of the Act, are to be defrayed out of moneys provided by Parliament (s. 6).

[*Authorities.*—See authorities cited under article EMPLOYERS AND WORKMEN.]

Concionator.—An old term for a common council-man (Cowel, *Law Dict.*).

Conclusive.—This term is used in statutes with reference (1) to judgments and orders or decisions of a Court or a public department or authority; (2) to evidence.

1. Where a judgment or order of a Court is declared to be final or conclusive, it cannot be questioned by appeal or otherwise unless given with such disregard of the jurisdiction of the Court as not to be really a decision, in which case it may be treated as a nullity (*Waterhouse v. Gilbert*, 1885, 15 Q. B. D. 569; *Lyon v. Morris*, 1888, 19 Q. B. D. 569; *Bryant v. Reading*, 1888, 19 Q. B. D. 139).

A decision of a magistrate declared to be final and conclusive under sec. 129 of the Metropolis Management Act, 1855, was held to be so only on the facts and not on the law (*R. v. Bridge*, 1890, 24 Q. B. D. 607); but the decision admitted the general rule and relied on subsequent legislation as giving an appeal on points of law.

Where an Order in Council or proclamation or order of a Government department is declared to be conclusive, its legality cannot be questioned by the ordinary tribunals, so long as it is made by the proper authority. Thus Orders in Council applying the Extradition Acts to a treaty are made conclusive and binding in Courts of justice (33 & 34 Vict. c. 52, s. 5). And orders of County Councils as to boundaries confirmed by the Local Government Board under sec. 57 of the Local Government Act, 1888, are, after six months from confirmation, to be presumed to have been duly made and to be within the powers of the section, and their legality cannot be challenged (Local Government Act, 1894, s. 42). During the six months they can apparently be challenged by *certiorari* (see *Smith v. Todmorden Local Board*, 1861, 30 L. J. Q. B. 305), and certainly by petition (Act of 1888, s. 57; Act of 1894, s. 41); and see *Slattery v. Naylor*, 1888, 13 App. Cas. 452; and *Institute of Patent Agents v. Lockwood*, [1893] App. Cas. 347.

2. Where a document or evidence is made conclusive it creates a presumption *juris et de jure* in favour of the truth and legality of the matter stated, and no evidence can be adduced to contradict it. Thus where production of a copy of an order, proclamation, or document printed by authority is made conclusive evidence of some fact, no further inquiry will be allowed as to the fact or the legality of the procedure by which the fact arose (*R. v. Levi*, 1865, 34 L. J. M. C. 174). "Conclusive" evidence is distinguishable from evidence which is made "sufficient" (*Barraclough v. Greenhough*, 1867, L. R. 2 Q. B. 612). Thus the certificate of an analyst under the Sale of Food and Drugs Acts, which, if in accordance with the prescribed form is "sufficient" evidence (38 & 39 Vict. c. 63, s. 21), is only *prima facie* evidence, and can be rebutted by the defendant or disregarded in the light of the justices' own knowledge or in favour of an analysis ordered by the justices under sec. 22 of the Act of 1875 (*R. v. Field*, 1894, 11 T. L. R. 240; *Hewitt v. Taylor*, [1896] 1 Q. B. 287; *Newby v. Sims*, [1894] 1 Q. B. 478).

Concordat is the name given to a treaty between the Pope and a temporal Power. Since the power of the Holy See has become entirely of a spiritual nature, concordats are merely the contracts by which matters concerning the internal government of the Roman Church in different countries are arranged.

Concurrent Findings.—It is a general rule of practice on appeals in the Privy Council not to reverse the concurrent findings of two Courts on a question of fact (*Hay v. Gordon*, 1872, L. R. 4 P. C. 337, 348; 21 W. R. 11); and the question for the Privy Council is, not what conclu-

sion their Lordships would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong (*Allen v. Quebec Warehouse Co.*, 1886, 12 App. Cas. 101; 56 L. T. 30; 56 L. J. P. C. 6).

The same rule obtains in the House of Lords (*Owners of P. Caland v. Glamorgan Steamship Co.*, [1893] App. Cas. 207, per Lord Herschell, p. 215; 62 L. J. P. 41; 68 L. T. 469). The rule does not apply where there is no conflict of testimony, and the only question of fact is as to the effect of the facts proved in raising further inferences of fact (*Thurburn v. Steward*, 1871, L. R. 3 P. C. 478; 40 L. J. P. C. 5; 19 W. R. 678).

Concurrent Sentences.—Sentences are said to be concurrent when made to run from the same date in respect of convictions on several counts or indictments. The term is used in opposition to consecutive or CUMULATIVE SENTENCES (*q.v.*). Prior to the case of *R. v. O'Connell*, 1844, 5 St. Tri. N. S. 2, it was usual to sentence a convicted person generally on the whole indictment; but the present practice is to impose concurrent sentences on each count on which a conviction is made and recorded, so that if on a special case stated or a writ of error any counts are quashed as bad, the sentences on the valid counts may still hold good. All English Courts of criminal jurisdiction have in all non-capital cases full power and discretion to make the sentences for two or more offences adjudicated upon at the same sessions concurrent unless some statutory exception limits their power, *e.g.* where a ticket-of-leave man is convicted of another crime during the currency of his ticket; in which case the Court has no alternative, under sec. 9 of the Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), but to send the convict back to prison to complete the *remainder* of his original sentence, *after* undergoing the punishment for his subsequent offence (*R. v. King*, [1897] 1 Q. B. 214).

Concurrent Writs.—It is convenient to have concurrent writs where there are several defendants, or where an original writ is lost before service. A plaintiff may issue one or more concurrent writs at the time of issuing an original writ, or at any time within twelve months thereafter. Concurrent writs bear teste of the same day as the original writ, and are sealed "concurrent" with the date of issue. A concurrent writ remains in force for the period during which the original writ is in force (Order 6, r. 1).

A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction, and *vice versa* (Order 6, r. 2, and see *Beddington v. Beddington*, 1876, 1 P. D. 426; 45 L. J. P. 44). A concurrent writ for service out of the jurisdiction may issue, by leave, although the original writ is in form for service within the jurisdiction (*Smalpage v. Tonge*, 1886, 17 Q. B. D. 644; 55 L. J. Q. B. 518; 34 W. R. 768). Where there is a defendant who is sometimes in England and sometimes abroad, this is a convenient practice (*ibid.*). See the same case as to the renewal of a concurrent writ.

Conditional Acceptance is an acceptance "which makes payment by the acceptor dependent on the fulfilment of a condition therein stated" (Bills of Exchange Act, 1882, s. 19, subs. 2 (a)). An

acceptance in this form, "Accepted, payable on giving up bill of lading for 76 bags of clover seed, per *Amazon*, at the L. & W. Bank," is a conditional acceptance which renders the acceptor liable to pay the bill upon delivery of the bill of lading (see *Smith v. Vertue*, 1860, 30 L. J. C. P. 56). The holder of a bill may refuse to take a conditional acceptance, and may treat it as dishonoured unless he gets an unqualified acceptance. The drawer or an indorser, unless he has authorised or subsequently assented to the taking of a conditional acceptance, is discharged from liability on the bill by the holder taking such an acceptance; but the drawer or indorser is deemed to have assented to the taking thereof unless within a reasonable time after receiving notice of the same he expresses dissent to the holder (Bills of Exchange Act, 1882, s. 44). See **BILLS OF EXCHANGE**.

In the law relating to the sale of goods, by arrangement, goods may be accepted conditionally, and the acceptance may be withdrawn on failure of the condition. Goods, for example, are frequently accepted by a person conditionally on their proving suitable for his purposes. Such acceptance becomes absolute when the goods are retained beyond the time fixed, or beyond a reasonable time, if no time has been fixed for their return.

Conditional Advance Note.—A note given by the master of a ship promising to pay to the order of the member of his crew named therein a specified amount (which must not exceed the amount of one month's wages of such seaman) after the expiration of a certain number of days after the sailing of the ship, conditionally upon such seaman going to sea therein, in pursuance of his agreement with the master (see the Merchant Shipping Act, 1894, s. 140). The object of such notes is "that the sailor shall not receive an advance in cash before the sailing of the ship, which, from the known improvident habits of mariners, would inevitably be thrown away; but that he shall be enabled, by means of an instrument payable within a short period after the departure of the vessel, to procure articles which are essential to his comfort and well-being on the voyage" (per Cockburn, C.J., in *M'Kune v. Joynton*, 1858, 5 C. B. N. S. 218). Such notes are not negotiable. (*Cardiff Boarding Masters Association v. Cory*, 1893, 9 T. L. R. 388).

Conditional Allotment.—The allotment of shares by a company must be unconditional in order to bind the applicant. If the allotment is conditional, if, for example, it introduces a new term, it is not an acceptance of the offer to take shares, but a new offer by the company, which may or may not be accepted by the applicant. See **COMPANY**.

Conditional Application.—An applicant for shares in a company may stipulate that it is only on the performance of some condition precedent by the company that he will agree to accept the shares. For example, where a person applied for shares in a banking company on condition of his being appointed local manager, and the shares were allotted to him, but he was not appointed local manager, it was held that his application was conditional, and that he did not become a shareholder in the company (*Universal Banking Co., Rogers' case*, 1868, L. R. 3 Ch. 633). But the breach of a merely collateral agreement

made between the applicant and the company will not entitle the applicant to have his name taken off the list of contributors, although it may possibly give him a claim against the company (*In re Richmond Hill Hotel Co., Elkington's case*, 1867, L. R. 2 Ch. 511). See COMPANY.

Conditional Appointment.—Conditions not authorised by the power of appointment annexed to a gift are void, and the gift takes effect absolutely. But the donee of an exclusive power of appointment in favour of children may appoint to one child on a contingency, and if the contingency does not happen, to another child. So, also, a condition annexed is good if it is not inconsistent with the scope of the power, and can be performed by the appointee. See cases cited and discussed in Farwell on *Powers*, 2nd ed., pp. 298 *et seq.*

Conditional Assent.—A person may assent to do or pay something in a certain event, *e.g.* he may assent to accept and pay for goods delivered to him on approval, conditionally on his being satisfied with them. Such assent becomes absolute on the condition being fulfilled. See CONTRACT.

Conditional Covenant.—A covenant whereby a person undertakes to do something on the happening of a certain event. An illustration of such a covenant frequently occurs in marriage settlements, where the father of the intended wife covenants to pay to the trustees of the settlement a sum of money conditionally on the marriage taking place.

Conditional Fee.—Under the old common law an estate granted to a person and his heirs of a particular class—*e.g.* the heirs of his body, or the heirs male of his body—was so termed. Such an estate was alienable by the grantee only on the birth of issue of the prescribed class, and in the event of his dying without such issue, or on failure thereof, the estate reverted to the grantor or his successors. Being subject to this condition, an estate of this kind received the name of a conditional fee; but by the Statute *De donis conditionalibus* such estates were turned into estates tail (*q.v.*). See 2 Black. Com. pp. 110 *et seq.* As, however, that statute applied only to estates of freehold, there may still be conditional fees in copyhold, where, by the custom of the manor, there cannot be estates tail (*Pullen v. Middleton*, 1754, 9 Mod. Ca. 483).

Conditional Legacy.—"A bequest, whose existence depends upon the happening, or not happening, of some uncertain event, by which it is either to take place or be defeated" (Roper, *Law of Legacies*, 4th ed., vol. i. p. 748). Any expression showing the intention of the testator to create a condition will be given effect to, no particular words being necessary. Conditions are of two kinds—conditions precedent and conditions subsequent. In the case of the former, the legacy does not vest until the condition has been fulfilled; while in the case of the latter, the legacy vests at once, but is subject to be defeated by the non-fulfilment or breach of the condition. A bequest to A.,

provided he marries B., is an instance of a legacy which does not vest until the precedent condition is fulfilled; whereas a bequest to A., to be paid to her at the age of twenty-one, and if she should die before twenty-one or marriage then over, is an example of a legacy which vests at once, but is subject to be defeated by the non-fulfilment of the condition (see Williams, *Executors and Administrators*, 9th ed., vol. ii. pp. 1122 *et seq.*). See CONDITIONS; LEGACY.

Conditional Limitation.—An estate so expressly defined and limited by the words of its creation that it cannot endure for a longer time than until the happening of a specified event, which may or may not happen, or which shall endure only so long as an existing state of things endures, which may possibly endure for ever. Land granted to a person *so long as* he is parson of Dale, or *while* he continues unmarried, or *as long as* the Church of St. Paul shall stand, are examples of conditional limitations. In such cases the estate determines as soon as the specified contingency happens or the existing state of things ceases to exist, and the next subsequent estate becomes immediately vested without any act being done by the person next entitled; in this respect a conditional limitation differs from a grant subject to a condition subsequent where breach of the condition does not *ipso facto* determine the estate, and where entry or an action for possession is necessary (2 Black. Com. 155; Challis, *Real Property*, 2nd ed., pp. 224 *et seq.*).

Conditional Order.—An order granted by the Court, subject to the performance by the party obtaining it of some condition; a common instance being in actions for specific performance, where, *e.g.*, a defaulting purchaser may be ordered to pay the amount due upon execution by the vendor of the conveyance and delivery of the title-deeds. If the party obtaining such an order does not perform or comply with the condition, he is considered to have waived or abandoned the order, and any other person interested in the matter may take such steps as the order may warrant, or which he might have taken if no such order had been made, unless the Court or a judge otherwise directs (R. S. C., Order 42, r. 2). Leave must be obtained before execution can be issued on a conditional order (*ibid.* r. 9). See also RULE NISI.

Conditional Promise.—A promise by a person to do or pay something in a certain event (other than the mere will of the promiser), *e.g.* to pay for specified work on its execution to his satisfaction, is a valid promise which binds him on the condition being fulfilled. See CONTRACT.

Conditional Will.—A will which is to take effect only upon the condition stated therein being fulfilled. For example, a document in these terms: "Being obliged to leave England to join my regiment in China. . . . I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter . . . to be divided," etc., was held to be a conditional will, which, as the deceased had

returned from China, could not be admitted to probate (*In re the Goods of Porter*, 1869, L. R. 2 P. & D. 22). In giving judgment in that case, Lord Penzance said: "It is the common feature of wills in respect of which this sort of question arises, that the testator therein refers to a possible impending calamity in connection with his will; and the question arises, whether he intends to limit the operation of the will to the time during which such calamity is imminent. If the language used by him can, by any reasonable interpretation, be construed to mean that he refers to the calamity and the period of time during which it may happen, as the reason for making a will, then the will is not conditional; but if he refers to the calamity . . . as a reason for a certain disposition of his property, and mixes up the disposition of the property with the event, so that one is dependent on the other, then the Court must hold the will to be conditional."

Conditions.

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Meaning and Divisions.—The term *condition* is used indifferently to mean either the event upon the happening of which an estate or an obligation is to commence or cease, or the provision or stipulation in the grant or will or contract that the estate or obligation shall depend upon the happening of the event.

Conditions are generally classified as *conditions precedent*, which must be performed or satisfied before the estate or obligation can arise, and *conditions subsequent* upon the performance or occurrence of which its continuance depends (Co. Lit. 201, *b*; Bac. Abr. Condition B & C). In *Ex parte Collins*, 1875, L. R. 10 Ch. at p. 372, James, L.J., enumerated also a class "conditions inherent" — "when the estate is qualified, restrained, or charged" by them. "Concurrent conditions" are sometimes spoken of (Sale of Goods Act, 1893, s. 28), where concurrent obligations or promises would seem to be the proper expression (see below, II.); see Chalmers on *Sale*, Appendix II. note A.

For the distinction between a devise upon condition and a devise which raises an "election," see Theobald on *Wills*, 4th ed., p. 89, and *Cooper v. Cooper*, 1874, L. R. 7 H. L. 53.

A grant or devise upon condition of making payment to third persons is usually equivalent to a grant or devise on a trust (Theobald, p. 450; *A.-G. v. Wax Chandlers*, 1873, L. R. 6 H. L. 1).

I. CONDITIONS IN GRANTS AND GIFTS.

Conditional Limitations.—A condition proper must be distinguished from a conditional limitation or executory devise. The difference is that in

the case of a condition properly so called the estate is to revert to the grantor or his heirs; in the other cases, it is limited to other persons (per Kay, J., in *In re Dugdale*, 1888, 38 Ch. D. at p. 179). A conditional limitation may be described generally as a qualification annexed to the grant of an estate, and providing for its termination, or for its abridgment by operation of law, upon the occurrence of some event which may or may not happen, and which, if it happen, must precede the occurrence of the event upon which the estate would expire if it had been given unconditionally (Edward's *Compendium*, 3rd ed., p. 46; 2 Black. Com. 155; see *In re Macn*, 1882, 21 Ch. D. 838). If an estate is determinable for breach of a condition, it is only determined by the grantor, or his successor, electing to re-enter for the breach, and consequently no remainder can be limited after a condition, but if the estate is subject to a conditional limitation, when the event happens the remainderman becomes entitled without entry (Co. Lit. 214, b; 2 Black. Com. p. 155).

Void Conditions.—Conditions which are impossible, illegal, or repugnant cannot take effect, so that if they are conditions precedent the grantee never becomes entitled, and if they are conditions subsequent he holds the estate absolutely (2 Black. Com. p. 156; Co. Lit. 206, a, b).

It is doubtful whether this proposition is correct as regards legacies of personal estate upon a condition precedent which is physically impossible of performance, or is made impossible by the act of the testator, or is illegal as being *malum prohibitum*, or whether in such cases the condition should not be struck out, leaving the legacy standing (see *In re Moore*, 1887, 39 Ch. D. 116; Theobald on *Wills*, 4th ed., 452; Jarman, 4th ed., ii. p. 12).

Conditions subsequent which are repugnant to the grant or gift to which they are attached are void. For instance, conditions following upon the grant of an absolute interest which restrain all alienation (Bac. Abr. D. 4; see *Bradley v. Peixoto*, 1787, 3 Ves. 324; 4 R. R. 7; *In re Dugdale*, 1888, 38 Ch. D. 176; Co. Lit. 223, a), or determining the interest upon bankruptcy (see *Metcalf v. Metcalf*, 1889, 43 Ch. D. 633), or if the donee dies intestate (*Holmes v. Godson*, 1856, 8 De G. M. & G. 152; *In re Wilcox Settlement*, 1875, 1 Ch. D. 229), or if the tenant for life bar the entail (*Dawkins v. Baron Penrhyn*, 1878, 4 App. Cas. 51). And the rule holds whether the interest is given for ever or for life (see *Rochford v. Hackman*, 1852, 9 Hare, 475). But if the grant or gift can be construed as a conditional limitation until alienation, etc., it is good, and the provision determining it on alienation is effective (*l.c.*).

If the interest conferred is to vest in possession at a future time, it may be made forfeitable on alienation or bankruptcy before the time comes (see *In re Porter*, [1892] 3 Ch. 481; *Metcalf v. Metcalf*, *supra*, [1891] 3 Ch. 1; *In re Sampson*, [1896] 1 Ch. 630; and *In re Carew*, [1896] 2 Ch. 311).

Conditions for forfeiture upon or because of the exercise of the powers conferred by the Settled Land Acts are void (S. L. A., 1882, ss. 51, 52).

Perpetuity.—A right of re-entry for breach of condition would no doubt be held to be within the rule against perpetuities (see Challis, *Real Property*, 1st ed., p. 152; *Dunn v. Flood*, 1883, 25 Ch. D. 629; 28 Ch. D. 586).

Who can re-enter for Breach of Condition.—At common law only the grantor and his privies in right and representation, that is (1) his heirs *quoad* estates descendible to them, (2) his executors or administrators *quoad* estates descendible to them, and (3) the successors of corporations sole (Challis, *Real Property*, 1st ed., p. 62; Litt. s. 347; Co. Lit. 214, 215). But this rule is now abolished as far as regards conditions which are incidental to a lessor's reversion. By the Statute 32 Hen. VIII. c. 34, the grantee

of the reversion expectant upon a lease in the whole of the land subject to the lease was enabled to take advantage of any right of re-entry incident to the reversion under the lease (Co. Lit. 215, *a*). By the Statute 22 & 23 Vict. c. 35, s. 3, the same advantage was extended to the assignee of the reversion in part of the land, so far as regards re-entry for non-payment of rent. And now by the Conveyancing Act, 1881 (s. 10 (1)), every condition of re-entry and other condition in a lease is annexed and incident to, and goes with the reversionary interest in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding any severance. And by sec. 12, notwithstanding the severance of the reversion, or the avoidance or cesser of the term granted by a lease, as to part only of the land comprised therein, every condition and right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed part of the reversion (see *Mayor of Swansea v. Thomas*, 1882, 10 Q. B. D. 48; *Baynton v. Morgan*, 1888, 21 Q. B. D. 101; 22 Q. B. D. 74). These sections only apply to leases made since the Act.

It is provided by the Real Property Act, 1845 (s. 6), that a right of re-entry may now be assigned by deed, and by the Wills Act (s. 3), that it may be devised. But a right to re-enter for condition broken appears not to be within these Acts (*Hunt v. Bishop*, 1853, 8 Ex. Rep. 675; *Hunt v. Remnant*, 1854, 9 Ex. Rep. 635), possibly because it is at the election of the person entitled to enter to determine whether he will enter or not (per Jessel, M. R., in *Jenkins v. Jones*, 1882, 9 Q. B. D. at p. 131). It seems therefore that a condition contained in a grant for an estate of inheritance is still inalienable (Edwards, *Compendium*, 3rd ed., p. 119).

Performance of a condition is excused or taken to be waived if it has been rendered impossible by the testator or grantor (Co. Lit. 206, *b*; *Yates v. University College*, 1875, 7 L. R. H. L. 438; *Walker v. Walker*, 1860, 2 De G., F. & J. 255), or by the person who would be entitled to enter upon the breach (*Falkland v. Bertie*, 1696, 2 Vern. at p. 344).

Relief against Forfeiture.—If the condition broken is a condition precedent, no relief can be given against the loss of the estate (*Popham v. Bampffield*, 1683, 1 Vern. at p. 83). But in some of the old cases it was said that where the condition is of the nature of a penalty (*Woodman v. Blake*, 1691, 2 Vern. 222; 1 Vern. p. 83, *n* (1)), and compensation for the breach could be ascertained and awarded (*Sweet v. Anderson*, 1772, 2 Bro. P. C. 256), relief could be given in equity. But it is most unlikely that the Court would now relieve against any condition, not meant merely as a security for the payment of money, except in the case where a statutory jurisdiction has been conferred, as in that of re-entry under a condition in a lease (Conveyancing Acts, 1881, s. 14; 1892, ss. 2, 4; see *Barrow v. Isaacs*, [1891] 1 Q. B. 417, where a forfeiture on assignment of the lease without consent was enforced; *Howard v. Fanshawe*, [1895] 2 Ch. 581, and the notes to *Peachy v. Duke of Somerset* in White and Tudor's *Leading Cases*).

See further as to conditions in settlements, SETTLEMENT, and in wills, WILLS. As to conditions of re-entry in leases, see LANDLORD AND TENANT; as to conditions in restraint of marriage, MARRIAGE; and as to conditional limitations and estates upon condition, ESTATES.

II. COVENANTS AND CONTRACTS.

Condition to be performed by Promisor.—No legally binding promise can be conditional on the mere will of the promisor. Thus a promise to pay as much as he pleases creates no obligation. A grant in consideration of

such a promise is voluntary (*Rosher v. Williams*, 1875, L. R. 20 Eq. 210). And a contract is *prima facie* intended to be perpetual unless its terms or the subject-matter show it is not (*Llanelly Rwy. v. L. and N.-W. Rwy.*, 1873, L. R. 8 Ch. 942; 7 H. L. at p. 567; Leake on *Contracts*, 3rd ed., p. 581). But a contract may be contingent upon the approval of one party to it. Thus in *Andrews v. Belfield*, 1857, 2 C. B. N. S. 779, the approval by the defendant of the carriage built for him by the plaintiff was a condition precedent to his liability to pay for it. In such a case it is only necessary that the party should honestly refuse his approval. If he does so he will escape liability. He is not bound to be reasonable (*Stadhard v. Lee*, 1863, 3 B. & S. 364). And contracts may be determinable at will, or upon some event within the control of the promisor (cp. the common condition for rescission in a contract for the sale of land (Leake, *ibid.*).

Conditions dependent on the will of a third party are common conditions, e.g. promises by the building owner to pay on the approval of his architect (see Leake, p. 554, and Hudson on *Building Contracts*). So also are conditions dependent on an act to be done by a third party (*Worsley v. Wood*, 1796, 6 T. R. 710; 3 R. R. 323). In such cases, non-performance of the condition is not excused because the person to do the act wrongfully refuses to do it (i.e. *London Guarantee Co. v. Fearnley*, 1880, 5 App. Cas. at p. 916).

Conditions Precedent; Mutual Obligations.—Whether a condition is precedent or not is a question of construction. The question most usually arises where there are mutual covenants or obligations, and the inquiry is whether the performance of his obligation by one party is a condition precedent to his right to sue the other party for specific performance, or for damages for non-performance of that other party's obligation. In the absence of any intention expressed or to be deduced from the subject-matter of the contract, the following rules have been laid down. They were originally formulated in the notes to *Portage v. Cole* in 1 Williams' Saunders, and they are given below substantially in the form adopted in Elphinstone on *Deeds*, ch. 29. They are not technical rules, but rules of construction only to ascertain the intention of the parties (Bac. *Abr.* Condition B (1), per Tindal, C.J., in *Stavers v. Curling*, 1836, 3 Bing. N. C. at p. 368; *Roberts v. Brett*, 1865, 11 H. L. 337; see further, Leake, pp. 564 *et seq.*).

(a) If a time is fixed for doing the act to be done by the defendant, which time must, or may, come before the time fixed for the act to be done by the plaintiff, the performance of the plaintiff's act is not a condition precedent (Elph. Rule 165; Platt on *Covenants*, 95). Thus a vendor may sue for the price without tendering a conveyance, if the time for payment is fixed before that for completion (*Matlock v. Kinglake*, 1839, 10 Ad. & E. 50; *Sibthorp v. Brunel*, 1849, 3 Ex. Rep. 826; see below, *Concurrent Conditions*).

(b) Conversely, if the time for doing the defendant's act must happen after that fixed for doing the plaintiff's act, the plaintiff must do his act before suing (Elph. Rule 166; Platt, 83). For instance, if freight is payable on delivery of the goods, it cannot be sued for till the conclusion of the voyage (*Cook v. Jennings*, 1797, 7 T. R. 381; 4 R. R. 468). So where a contractor undertook to give a bond to secure the performance of his contract and payment of penalties under it, he could not sue on the contract without having given the bond (*Roberts v. Brett*, 1865, 11 H. L. 337). For contracts making a reference to arbitration, or to valuers, a condition precedent to action, see *Babbage v. Coulbourn*, 1882, 9 Q. B. D. 235; *Dawson v. Fitzgerald*, 1876, 1 Ex. D. 257; and *Scott v. Avery*, 1855, 5 H. L. 811.

(c) If the plaintiff's act is the sole consideration for the defendant's contract, he cannot sue until he has done it (Elph. Rule 168); but if it is only part of the consideration, and failure to do it can be compensated for to the defendant by damages, the contracts are independent (Elph. Rule 169). Thus, on the sale of a plantation and stock of negroes with a covenant for title, in consideration of an annuity, an action being brought for an instalment of the annuity, it was held to be no defence that the plaintiff had not made a good title to the negroes (*Boone v. Edge*, 1777, 1 Black. H. 273; 2 Black. W. 1312). So a covenant in a separation deed to pay an annuity by the husband is not conditional upon a covenant by the wife not to molest him (*Fearon v. Aylesford*, 1884, 12 Q. B. D. 539; 14 Q. B. D. 792). A defendant who has received and retained the substantial consideration cannot set up the non-performance of a condition precedent (*Carter v. Scargill*, 1875, L. R. 10 Q. B. 564; *Ellen v. Topp*, 1851, 6 Ex. Rep. at p. 441). In the former case, the Court said, "We come, therefore, to the conclusion that that which might have been a condition precedent has ceased to be so by the defendant's subsequent conduct in accepting less than his bargain, if, in fact, there was any substantial deficiency."

See generally the authorities cited above, and also the notes to *Cutter v. Powell*, in 1 Smith's *Leading Cases*.

Performance of the conditions precedent necessary to his case is implied in the pleadings of each party, but if the performance is intended to be contested, this must be distinctly specified (R. S. C., Order 19, r. 14).

Concurrent Conditions.—"When two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without averring a performance, or an offer to perform, his own part, though it is not certain which of them is obliged to do the first act; and this particularly applies to cases of sale" (Williams' *Saunders*, *loc. cit.*; 1 Smith, *L. C.* pp. 19 *et seq.*; *Stephens v. De Medina*, 1843, 4 Q. B. 442). As already stated, the party need not now allege that he was willing and ready to do his part (Order 19, r. 14). He must prove it if it be denied.

Upon a sale of goods, unless otherwise agreed, delivery and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods (Sale of Goods Act, 1893, s. 28; *Morton v. Lamb*, 1797, 7 T. R. 125; 4 R. R. 395).

The same rule holds upon a sale of land (*Glazebrook v. Woodrow*, 1799, 8 T. R. 364; 4 R. R. 700; *Marsden v. Moore*, 1859, 4 H. & N. 500). The vendor cannot sue for the price, but only for damages, until he has executed, or offered to execute, a conveyance (*Laird v. Pim*, 1841, 7 Mee. & W. 474; Dart's *Vendors and Purchasers*, ch. 17); but if it is the purchaser's duty to prepare the conveyance, as is the case where the contract is silent on the subject, it is sufficient for the vendor to prove that he was ready and willing to execute a conveyance (Dart, *loc. cit.*; *Stephens v. De Medina*, 1843, 4 Q. B. 422; *Poole v. Hill*, 1840, 6 Mee. & W. 835). The purchaser, under the like circumstances, cannot sue for breach of the contract without having tendered a conveyance (*Stephens v. De Medina*, *supra*), unless he could show the tender had been excused (see below).

Conditions Subsequent.—The commonest example of such a condition is the proviso for re-entry in a lease, as to which see LANDLORD AND TENANT.

Whether a stipulation in a contract for the sale of goods amounts to a

condition for the breach of which the buyer may repudiate the contract, is a matter of intention to be ascertained by construction of the contract (Sale of Goods Act, 1893, s. 11 (1) b). See further, Leake, p. 581.

Implied Conditions.—If the act agreed to be done requires the assistance of the promisee, his assistance is a concurrent condition (*Mackay v. Dick*, 1881, 6 App. Cas. 251, per Lord Blackburn, at p. 263; *Ford v. Cotesworth*, 1870, L. R. 5 Q. B. 544).

As to conditions implied on sales of goods or land, see CAVEAT EMPTOR.

Conditions are implied in many contracts by law or by mercantile usage; for instance, that the ship is seaworthy in a contract for carriage by sea. These conditions are noticed under the headings of the different contracts to which they relate.

Impossible and Illegal Conditions.—The general rule is that a condition which is impossible of performance is taken to be not performed, consequently if it is a condition precedent or concurrent the obligation does not arise; if a condition subsequent, the obligation is determined (Co. Lit. 206 a; Bac. Abr., Condition D; *Hale v. Rawson*, 1858, 27 L. J. C. P. 189).

So a bond with a condition which was originally impossible of performance is equivalent to an absolute undertaking to pay (Co. Lit. 206 b; Shep. Touchstone, 372). But where performance becomes subsequently impossible "by the act of God, or of the law, or of the obligee," the bond itself is held to be unenforceable (Co. Lit. 206 a; Pollock on Contracts, 6th ed., p. 418, per Williams, J., in *Brown v. Mayor of London*, 1861, 9 C. B. N. S. at p. 747). But the bond may show an agreement which can be performed, although expressed so as to be defeasible only by an impossible condition (*Beswick v. Swindells*, 1835, 3 Ad. & E. 868). See further under CONTRACT.

Performance is excused or waived, if the other party refuses to accept or allow it (*Jones v. Barkley*, 1781, 2 Doug. at p. 694, where Lord Mansfield said, "The party must show he was ready, but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act;" *Bank of China v. American Trading Co.*, [1894] App. Cas. 266), or if he prevent it (*Mackay v. Dick*, 1881, 6 App. Cas. 251), or make performance useless or impossible (*Mayne's case*, 5 Co. Rep. 25 a; *Sands v. Clarke*, 1849, 8 C. B. at p. 762; *Caines v. Smith*, 1846, 15 Mee. & W. 189; Com. Dig. Condition L). If one party repudiates the contract or incapacitates himself from performing his part, the other can sue for damages without performing conditions precedent (*Lovelock v. Franklyn*, 1846, 8 Q. B. 371; *Hochster v. De la Tour*, 1853, 2 El. & Bl. 678). But it is no excuse that a third party prevents the performance (*Worsley v. Wood*, 1796, 6 T. R. 710, cited above; Leake, p. 580). As to the acceptance of performance without the condition, see *Carter v. Scargill*, 1875, L. R. 10 Q. B. 574, cited above.

The Sale of Goods Act, 1893, provides (s. 11 (1)) that where there is a condition to be fulfilled by the seller, the buyer may waive the condition (as such) and treat the breach of it as a breach of warranty, and not as a ground for repudiating the contract. If the buyer has accepted the goods, and the contract is not severable, he can only treat the condition as a warranty, that is to say, can only claim damages or a reduction of the price in respect of the breach of it (s. 11 (1) c).

As to severable contracts, see *Ritchie v. Atkinson*, 1808, 10 East, at p. 308; *Wilkinson v. Clements*, 1872, 8 Ch. 96.

A bond with an illegal condition is wholly void (Co. Lit. 206 b, see note

(99)), and the distinction noted by Coke between conditions which are *mala in se* and those which are *mala prohibita* would now be recognised. If, however, the bond is to do several things, and only some of them are against the law, the bond will be good to secure the performance of the things which are not against the law (*ibid.* note (99); *Norton v. Simmes*, 1615, Hob. 12; *Chesman v. Nainby*, 1727, 2 Raym. (Ld.) 1456).

See further above, I. *Void Conditions*; Pollock on *Contracts*, 6th ed., pp. 414–419, and impossible and illegal contracts under CONTRACT.

Relief against Non-performance.—The penalty in a bond is treated as a security only for the performance of the acts stipulated for in the condition (*Preston v. Daniel*, 1872, L. R. 8 Ex. 19). See above, I. *Relief against Forfeiture*.

Notice.—Where a party's liability is contingent upon the happening of an event, he is not entitled to notice from the other party that it has happened unless he has stipulated for it, or unless the event lies within the peculiar knowledge of such other party (Leake, p. 561; *Vyse v. Wakefield*, 1840, 6 Mee. & W., per Lord Abinger, at p. 452; *Makin v. Watkinson*, 1870, L. R. 6 Ex. 25). Where the *lessor* has undertaken to repair is a case within the latter class; the lessee must give him notice that repairs are needed (*l.c.*).

Construction of Conditions.—A large collection of cases in which conditions in particular contracts have been construed by the Courts will be found in *Bac. Abr.*, Condition; Leake, pp. 549 *et seq.*; Chalmers on *Sale*, 3rd ed., p. 180; and the notes to *Cutter v. Powell* in 1 Smith, *L. C.*

Conditions of Sale.

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When land is sold by auction the contract which has to be signed by the vendor and purchaser is usually embodied in a document prepared beforehand by the vendor's legal advisers, and consisting of three parts—the particulars of sale, the conditions of sale, and the memorandum. The function of the particulars is to describe the property, and to mention mortgages and other encumbrances which the vendor does not intend to remove. The conditions state the terms on which the property is sold, *e.g.* the title and proof of title which the purchaser may require, the date of completion, and the form of the conveyance. The memorandum contains the formal contract and embodies the particulars and conditions by reference. In the provinces it is usual to employ a printed form of conditions of sale approved by the local Law Society, and to add in writing any special conditions which may be required.

Statements in the conditions of sale may be relied on by the vendor to cure an ambiguity in the particulars (*Camberwell, etc. v. Holloway*, 1879, 13 Ch. D. 754), but not to cure a positive misdescription (*Evans v. Robins*, 1862, 21 L. J. Ex. 465) or the omission to mention in the particulars encumbrances such as mortgages (*Torrance v. Bolton*, 1872, L. R. 8 Ch. 118) or ground-rents (*Jones v. Rimmer*, 1880, 14 Ch. D. 588).

The conditions usually deal with the following matters:—the reserve

(see AUCTION), mode of bidding, payment of deposit (see DEPOSIT), separate payment for timber, fixtures, crops, etc., at a valuation, title, proof of title, and expenses of proving title, delivery of abstract and requisitions thereon, compensation for misstatements, power for the vendor to rescind if unable or unwilling to comply with the purchaser's requisitions, the conveyance, date, and place of completion, payment of interest on purchase money in case of delay, provision for possession and liability for outgoings, delivery of title-deeds, and forfeiture of deposit (see DEPOSIT).

Statutory Conditions.—The purchaser's rights in respect of title, proof of title, and expenses of proving title, have been cut down by the Vendor and Purchaser Act, 1874, and the Conveyancing Acts, 1881 and 1882 (as to expenses, see below, *Conditions as to Expenses*). The statutory conditions in the Conveyancing Act, 1881, s. 3, are not, however, to be treated as entitling the vendor to specific performance in cases where similar express conditions would not have that effect (subs. 11).

Conditions as to Title.—A condition limiting the purchaser's right to a good title, or to proof of the title, may fail of its effect in any of the four following ways:—(i.) The condition fails altogether if it does not cover the objection raised by the purchaser, as where the condition mentions the defect but does not definitely say that the purchaser shall not object (*Trustees of St. Saviour's Rectory and Oyler*, 1886, 31 Ch. D. 412), or precludes the purchaser from making requisitions on the vendor, but does not preclude him from making inquiries elsewhere (*Darlington v. Hamilton*, 1854, Kay, 550; *National Provincial Bank and Marsh*, [1895] 1 Ch. 190). The rule that a purchaser, who is only precluded by the condition from making inquiries of the vendor, may object to the title if he discovers a defect by inquiry elsewhere, is sometimes called the "rule of *aliunde*." A condition requiring the purchaser to "assume" or "admit" facts is construed as precluding him from objecting if the facts turn out otherwise (*Best v. Hamand*, 1879, 12 Ch. D. 1). (ii.) The condition fails—to the extent of enabling the purchaser to resist specific performance unless the condition is waived—if it is not sufficiently clear, or does not give the purchaser sufficient information as to the defect which the vendor wishes to preclude him from objecting to. This is chiefly the case in connection with innocent-looking common form conditions (e.g. as to tenancies, *Nottingham, etc. v. Butler*, 1886, 16 Q. B. D. 778), or with conditions shortening the title (*Marsh and Earl Granville*, 1883, 24 Ch. D. at p. 24); but not with special conditions obviously framed to cover a defect in title known to the vendor (*Sandbach and Edmondson*, [1891] 1 Ch. 99). (iii.) The condition fails—to the extent of enabling the purchaser to resist specific performance unless the condition is waived—if it is misleading (e.g. if it requires the purchaser to assume or admit facts which to the vendor's knowledge are untrue, *In re Banister*, 1879, 12 Ch. D. 131), or if it contains a statement of fact which is untrue or which the vendor is unable to prove (*Symons v. James*, 1842, 1 Y. & C. C. 487). (iv.) The condition fails—to the extent of enabling the purchaser to resist specific performance—if the vendor has no title at all to the property (*Scott and Alvarez*, [1895] 2 Ch. 603), even though the condition may be that the purchaser shall take "such title as the vendor has" (*Keyse v. Hayden*, 1853, 20 L. T. O. S. 244). Where the purchaser resists specific performance on the ground that the condition fails because the vendor has no title at all, it is not sufficient for the purchaser to show that the title is doubtful (*Scott and Alvarez*, [1895] 1 Ch. 596).

It is to be observed from the above cases that where the condition fails for reason (i.) as not covering the purchaser's objection, it fails altogether;

and not only will the vendor be unable to enforce specific performance, but the purchaser will be able to recover his deposit and expenses. In such a case the purchaser is not seeking to escape from his bargain; he complies with the condition, but the condition is not aptly worded for the vendor's purpose. Where the condition fails for reasons (ii.), (iii.), or (iv.), the failure is due to the Court treating the condition as unfair, misleading, or oppressive, and specific performance, being within the discretion of the Court, is refused. If, however, the condition is aptly worded to cover the purchaser's objection, the condition will succeed to the extent of precluding the purchaser from recovering his deposit or expenses (see as to (ii.), *Nottingham, etc. v. Butler*, 1886, 16 Q. B. D. 778; as to (iii.), *Nicoll v. Chambers*, 1852, 11 C. B. 996; as to (iv.), *Scott and Alvarez*, [1895] 2 Ch. 603).

Where, instead of the vendor suing for specific performance or the purchaser suing for his deposit, the point is raised on a vendor and purchaser summons, the position is not so clear. If the purchaser takes out a vendor and purchaser summons claiming his deposit, then if the Court holds that the defect is covered by the condition it will dismiss the summons, though it would not have decreed specific performance (*National Provincial Bank and March*, [1895] 1 Ch. 190). If, however, the question of the deposit does not arise, as where the vendor takes out the summons, then it would seem that if the Court is of opinion that specific performance ought not to be decreed, the summons must be dismissed although the defect is covered by the condition so that the purchaser could not recover his deposit. A purchaser's summons in a similar case expressly waiving all claim to the deposit would, it is thought, be successful.

Conditions as to Compensation.—A condition that "errors and misstatements shall not annul the sale, but shall entitle the purchaser to compensation," will not enable the vendor to enforce specific performance with compensation if the vendor has been guilty of fraud, or the misstatement or defect in the title was essential (*Dimmock v. Hallett*, 1866, L. R. 2 Ch. 21), or was such that compensation cannot be fairly assessed. Moreover, in such cases the purchaser may, notwithstanding the condition, rescind and recover his deposit and the expenses of the sale (*Flight v. Booth*, 1834, 1 Bing. N. C. 370). The latter proposition seems to be too firmly established by authority to be upset by the decision of *Scott and Alvarez*, [1895] 2 Ch. 603, that however defective the vendor's title is, if the conditions expressly preclude the purchaser from objecting, the Court will not order the return of the deposit. By "essential misstatement" in the above rule is meant a misstatement which induced the purchaser to purchase something which otherwise he would never have purchased at all, as distinguished from a misstatement, the only effect of which was to induce the purchaser to give a higher price than he would otherwise have given.

The condition above set out will enable the purchaser to obtain compensation (a) even after completion, unless the condition is expressly limited to errors pointed out before completion (*Turner and Skelton*, 1879, 13 Ch. D. 130); (b) in cases where on the ground of hardship to the vendor the Court would but for the condition have refused to decree specific performance with compensation (*Painter v. Newby*, 1853, 11 Hare, 26); and (c) in cases where a condition for rescission would, if there were no condition for compensation, entitle the vendor to rescind rather than comply with a demand for compensation (see below, *Conditions for Rescission*).

A condition refusing compensation to the purchaser cannot be relied on by the vendor as enabling him to compel the purchaser to complete without compensation, if there has been an essential misdescription or fraud on the

vendor's part (*Portman v. Mill*, 1826, 2 Russ. 570; 26 R. R. 175). On the other hand, such a condition will effectually preclude the purchaser from insisting on specific performance with compensation (*Terry and White*, 1886, 32 Ch. D. 14). The vendor's fraud, however, or essential misdescription will entitle the purchaser to recover his deposit notwithstanding such a condition (this follows from *Flight v. Booth*, 1834, 1 Bing. N. C. 370; but Cotton, L.J., doubted as to this in *Beffus and Masters*, 1888, 39 Ch. D. 110). The condition is strictly construed, not only in the vendor's action for specific performance, but also in the purchaser's action for his deposit. Thus the words "errors in description" in such a condition were held not to include errors in the description of the vendor's title, *e.g.* where an under-lease was described in the particulars as a lease (*Beffus and Masters*, 1888, 39 Ch. D. 110).

A condition allowing compensation to the vendor would probably preclude the purchaser from obtaining specific performance without compensating the vendor, and also from rescinding and recovering his deposit on the ground of unwillingness to complete with compensation to the vendor.

Conditions as to Requisitions.—A condition that the purchaser's requisitions on the abstract if not delivered by a given date shall be considered as waived, is strictly construed, and time is of the essence whether so stated or not (*Oakden v. Pike*, 1865, 34 L. J. Ch. 620). If, however, the condition also fixes a date for the delivery of the abstract, and the vendor does not deliver the abstract by the date fixed, the purchaser will be allowed a reasonable time for sending in requisitions (*Upperton v. Nickolson*, 1871, L. R. 6 Ch. 436). If the abstract, though delivered in time, is imperfect, the purchaser is entitled to a supplemental abstract and to further time for sending in his requisitions (*Gray v. Fowler*, 1873, L. R. 8 Ex. 249). If the vendor has no title at all, then the purchaser, though too late to send in requisitions, may not only refuse to complete but may possibly recover his deposit (*Want v. Stallibrass*, 1873, L. R. 8 Ex. 175; but the purchaser's right to recover the deposit is made doubtful by the decision of *Scott and Alvarez*, [1895] 2 Ch. 603; see above, *Conditions as to Title*). If the vendor's title is doubtful merely, the purchaser who is by the condition too late to send in requisitions cannot refuse to complete on the ground of doubtful title (*Oakden v. Pike*, 1865, 34 L. J. Ch. 620; compare *Scott and Alvarez*, [1895] 1 Ch. 596).

Conditions for Rescission.—The condition for rescission is designed to meet the case where in the absence of a condition the purchaser would be entitled to recover his deposit and expenses on the ground of the vendor's misdescription or defect in title. The condition does not enable the vendor to rescind if he has been guilty of fraud (see *Price v. Macaulay*, 1852, 2 De G., M. & G. 339, 347), or if he has no title at all to any part of the property (*Bowman v. Hyland*, 1878, 8 Ch. D. 588; but this decision is made doubtful by that of *Scott and Alvarez*, [1895] 2 Ch. 603).

A condition entitling the vendor to rescind for "objections and requisitions as to title" will not enable him to rescind for a claim by the purchaser for compensation in respect of a misstatement not involving a question of title. •But such a condition covers the case of a claim by the purchaser for compensation in respect of a defect in the title in a matter as to which no actual misstatement has been made (*Ashburner v. Sewell*, [1891] 3 Ch. 405; *Williams v. Edwards*, 1827, 2 Sim. 78). If the purchaser's claim is for compensation for a misstatement involving a matter of title, then a condition for rescission limited as above applies if there is no condi-

tion for compensation covering the misstatement, but does not apply if there is a condition for compensation covering the misstatement and it is proved or admitted that the title is defective and the vendor's statement consequently false (*Painter v. Newby*, 1853, 11 Hare, 26). If, however, it is not proved or admitted that the title is defective, but the question whether the vendor's statement is false or not depends on a disputed question of title, the claim for compensation would seem to be covered by the condition for rescission (see *Mawson v. Fletcher*, 1870, L. R. 6 Ch. 91).

A condition for rescission referring to "objections and requisitions" simply may through the context be held to refer only to objections and requisitions as to title (*Kitchen v. Palmer*, 1877, 46 L. J. Ch. 611), or to refer to requisitions other than requisitions as to title (*Terry and White*, 1886, 32 Ch. D. 14).

A condition for rescission in case of "objections and requisitions to or in respect of the title and of all matters appearing upon the abstract or the particulars or conditions of sale" will cover a claim for compensation for a deficiency in acreage (*Terry and White*, 1886, 32 Ch. D. 14).

The condition does not entitle the vendor to rescind for a requisition as to the conveyance unless this is expressly referred to in the condition (*Kitchen v. Palmer*, 1877, 46 L. J. Ch. 611). A condition including requisitions as to conveyance does not cover the purchaser's objection to an alteration in the draft conveyance by which the vendor seeks to impose on the purchaser a liability not previously affecting the property and not mentioned in the particulars or conditions (*Hardman v. Child*, 1885, 28 Ch. D. 712). A requisition that certain annuitants shall join in the conveyance is an "objection to the title" (*Page v. Adam*, 1841, 4 Beav. 269).

The condition is usually expressed to meet the case of requisitions which the vendor is unable or "unwilling" to comply with. The vendor's unwillingness must be reasonable, not arbitrary or capricious (*Starr-Bowkett and Sibun*, 1889, 42 Ch. D. 375). It would be unreasonable for the vendor to refuse to procure encumbrancers to join in the conveyance (*Jackson and Oakshott*, 1880, 14 Ch. D. 851) unless the encumbrances exceed the purchase money (*Great Northern Railway and Sanderson*, 1884, 25 Ch. D. 788) or the validity of the encumbrances is *bonâ fide* disputed by the vendor. But it is reasonable for the vendor to refuse to comply with a requisition on the ground of expense (*Dames and Wood*, 1885, 29 Ch. D. 626), even if the expense is thrown on the purchaser, because the vendor cannot be sure that when the costs are taxed he will recover all the expense from the purchaser (*Starr-Bowkett and Sibun*, 1889, 42 Ch. D. 387). The form of the vendor's refusal is immaterial (*ibid.*), and the vendor is not bound to state to the purchaser why he is unwilling to comply with the requisition (*Glenton to Haden*, 1885, 53 L. T. 434).

The condition usually is "if the purchaser shall *insist* on any objection or requisition." In such a case the vendor cannot rescind merely because the purchaser makes a requisition; the vendor must answer the objection before the purchaser can be said to insist (*Greaves v. Wilson*, 1858, 25 Beav. 290). If after receiving the vendor's answer the purchaser repeats his requisition, the vendor need not give him a *locus penitentiae*, but may rescind at once (*Duddell v. Simpson*, 1866, L. R. 2 Ch. 102). If the condition is worded "if the purchaser shall *make* any requisition," the vendor may rescind directly the purchaser sends in any requisition (*Starr-Bowkett and Sibun*, 1889, 42 Ch. D. 375).

A condition empowering the vendor to rescind "notwithstanding any

negotiation or attempt to comply with the requisition," does not cover the case of a purchaser saying that the vendor has no power to sell, and the vendor saying that he has; this is a dispute, not a negotiation (*Gardom v. Lee*, 1865, 3 H. & C. 651). A condition empowering the vendor to rescind "notwithstanding any litigation" does not enable the vendor to rescind after the purchaser has brought an action for the deposit and the vendor has put in his defence, the vendor having till then resisted a valid objection to his title and claimed to retain the deposit on the ground of the purchaser's default (*Best v. Hamand*, 1879, 12 Ch. D. 1; reversed on another ground), nor does such a condition enable the vendor to rescind after judgment has been given against him on the point in dispute (*Arbib and Class*, [1891] 1 Ch. 601).

A vendor who has rescinded under the condition cannot afterwards compel the purchaser to complete (*Smith v. Wallace*, [1895] 1 Ch. 385).

Conditions as to Expenses.—Most of the expenses of production and proof of title in relation to deeds and proof not in the vendor's possession are by the Conveyancing Act, 1881, s. 3, subs. 6, thrown on the purchaser. The statutory condition has been held to throw on the purchaser the expense of production of title-deeds in the possession of the vendor's mortgagee (*Willett and Argenti*, 1889, 60 L. T. 735), and the expense of searching for documents not in the vendor's possession including, in the case of leaseholds, the lease under which the vendor holds (*Stuart and Olivant and Seadon*, [1896] 2 Ch. 328); but not to absolve the vendor from the expense of procuring and making an abstract of a deed not in his possession forming part of the title for the statutory or agreed period (*Johnson and Tustin*, 1885, 30 Ch. D. 42), or of obtaining the execution of a document necessary to complete his title, e.g. a surveyor's certificate (*Moody and Yates*, 1885, 30 Ch. D. 344).

A condition that the purchaser "shall have proper surrenders, conveyances, or assignments at his own expense" will not relieve the vendor of the expense of procuring the concurrence of necessary parties (*Paramore v. Greenslade*, 1853, 1 Sm. & G. 541); but a slightly different condition was successful in *Willett and Argenti*, 1889, 60 L. T. 735. A condition throwing the expense of stamping unstamped documents on the purchaser is void as to instruments executed after the 16th of May 1888 (Stamp Act, 1891, s. 117).

Conditions as to Completion.—Conditions relating to completion usually fix a time for completion, making interest payable by the purchaser if completion is delayed, and providing that up to a given date the vendor, and after that date the purchaser, is to be entitled to possession or receipt of the rents and profits and liable for outgoings.

The time fixed by the condition for completion is not of the essence of the contract (*Roberts v. Berry*, 1853, 3 De G., M. & G. 284), unless this is expressly stipulated or the Court infers from the nature of the property (e.g. a public-house sold as a going concern, *Cowles v. Gale*, 1871, L. R. 7 Ch. 12) or the circumstances of the case that the parties intended time to be essential. A stipulation that interest shall be paid in case of delay may lead the Court to infer that time was not intended to be essential (*Webb v. Hughes*, 1870, L. R. 10 Eq. 281). If time is not of the essence, the defaulting party is allowed a reasonable time to complete (*Howe v. Smith*, 1884, 27 Ch. D. 89), with this exception that if the vendor has no title at all the purchaser may rescind at once, even before the date fixed for completion (*Forrer v. Nash*, 1865, 35 Beav. 171).

A condition making interest payable if completion is delayed "through

the purchaser's default" entitles the vendor to interest if the purchaser is in default notwithstanding that the interest exceeds the rents and profits (*Tewart v. Lawson*, 1856, 3 Sm. & G. 307). A condition making interest payable if completion is delayed "from any cause whatever" or "from any cause whatever except the wilful default of the vendor," will entitle the vendor to interest not only where the purchaser is in default, but where the vendor is unintentionally in default (*Williams v. Glenton*, 1866, L. R. 1 Ch. 200; *Helling and Merton*, [1893] 3 Ch. 269). If the vendor knew at the time he entered into the contract that there was a difficulty in the title which he would not be able to overcome by the date fixed for completion, his default is wilful (*Young and Harston*, 1885, 31 Ch. D. 168; *Helling and Merton*, [1893] 3 Ch. 269). Carelessness in stating the vendor's title is not wilful default (*Mayor of London and Tubbs*, [1894] 2 Ch. 524).

A condition that the purchaser shall be let into possession or receipt of rents and profits by a certain day entitles the purchaser to the rents or profits from that day (including where the vendor is in possession an occupation rent), but not to damages for loss of possession (according to the rule in *Flureau v. Thornhill*, 1776, 2 Black. W. 1078; *contra*, *Royal Bristol, etc. v. Bomash*, 1887, 35 Ch. D. 390), unless the vendor is guilty of fraud or wilfully refuses to complete, in which case the purchaser can obtain specific performance of the contract and damages for the loss of possession (*Jacques v. Millar*, 1877, 6 Ch. D. 153).

A condition that the vendor shall discharge the outgoings up to a certain date entitles the purchaser to recover for outgoings incurred before the contract but not discovered till after completion (*Midgley v. Coppock*, 1879, 4 Ex. D. 309). There is sometimes a difficulty in saying whether the expense of work done by a local authority (e.g. paving expenses) is within the condition or not. If the work is completed before the property is sold, then, in cases under the Public Health Act, 1875, the expense is an outgoing within the condition and payable by the vendor, although the final demand for payment was made after the property was sold (*Bettesworth and Richer*, 1888, 37 Ch. D. 535). In one case the expenses of demolition under the Metropolitan Building Act, 1855, were held to be an outgoing payable by the vendor under the condition, although the work was not done till after the date fixed for completion (*Tubbs v. Wynne*, [1897] 1 Q. B. 74, where by another condition the vendor "reserved the right to comply with the requirements of the local authority with respect to the condition of the buildings before completion of the purchase, notice having been served to pull down").

Sale in Lots.—On a sale in lots restrictions mentioned in the conditions of sale may be construed as intended for the benefit of the vendor only or for the common advantage of all the purchasers (see GENERAL BUILDING SCHEME). The condition "the vendor reserves the right of selling the unsold lots either subject to or not subject to the restrictions" is sufficient to prevent the purchasers from setting up a general building scheme (*Sidney v. Clarkson*, 1865, 35 Beav. 118).

A condition that the purchaser of the "largest lot" shall have the title-deeds gives the deeds to the purchaser of the lot largest in area not in value (*Griffiths v. Hatchard*, 1854, 1 Kay & J. 17), and not to the purchaser of the largest aggregate area made up by several lots (*Scott v. Jackman*, 1855, 21 Beav. 110).

Sale by Trustees.—Trustees may use such conditions as to title as they think fit (Trustee Act, 1893, s. 13), but must not use unnecessarily depreciatory conditions (*Dance v. Goldingham*, 1873, L. R. 8 Ch. 902). But a

purphaser buying from a trustee who has used unnecessarily depreciatory conditions cannot object to the title on that ground, and is protected before the execution of the conveyance, unless it appears that the consideration for the sale was thereby made inadequate, and, after the execution of the conveyance, is protected in every case except that of his collusion with the trustee (Trustee Act, 1893, s. 14).

Sale by the Court.—On a sale by the Court conditions are prepared by one of the conveyancing counsel of the Court, unless the judge otherwise directs (R. S. C., 1883, Order 51, r. 2). In the case of small properties the sale is generally made out of Court under Order 51, r. 1*a*. It is said that greater good faith and accuracy is necessary in a sale by the Court than in other sales (*In re Arnold*, 1880, 14 Ch. D. 270).

[*Authorities.*—See further, Dart on *Vendors and Purchasers* (ed. 1888), and Webster on *Conditions of Sale* (ed. 1896).]

Condonation.—See DIVORCE.

Conduct of Action ; Proceedings.—See PARTIES.

Conduct of Sale.—See SALE.

Conference (in Litigation).—A conference is a meeting between a counsel and the solicitor instructing him in a case for the purpose of considering or advising upon it, or any stage or development of it. See CONSULTATION.

Confession.—A direct admission or acknowledgment of his guilt by a person who has committed a crime. It may be judicial or extra-judicial.

Judicial Confessions.—The old books specify four forms of judicial confession.

(*a*) A plea of guilty on arraignment for an indictable offence, on which, instead of proceeding to trial, the Court directed judgment *quod cognovit indictamentum* (*Powlter's case*, 1615, 11 Co. Rep. 66). A plea of not guilty made and recorded could be withdrawn, and a confession made and recorded in its stead. The plea is not conclusive, nor even evidence in proceedings for the civil damage caused by the offence being regarded as *res inter alios acta*. A prisoner who thus pleads guilty is "adjudged guilty on his own confession." In old times a distinction was drawn between conviction by verdict and conviction on confession; but a conviction in modern Acts seems to include a plea of guilty (*R. v. Blaby*, [1894] 2 Q. B. 170). Hale (1 P. C. 24) says that a Court ought not to record the confession of a person under twenty-one, but should put him to plead not guilty. *

(*b*) A plea of guilty by an approver who prayed to have a coroner appointed to whom he might relate all the circumstances of the offence (3 Co. Inst. 129). See APPROVER.

(*c*) A confession before a coroner in a church or other sanctuary, as a preliminary to abjuring the realm (see SANCTUARY).

(d) Submission on indictment for a misdemeanour to a fine without direct admission of guilt. In such a case the accused *posuit se in gratiam regis* (Lambarde, *Eirenarcha*, bk. iv. c. 9; Hawk., P. C., bk. ii. c. 31, s. 3).

To these must be added (e) confessions made before a magistrate, or in open Court during a preliminary inquiry into, or on the summary trial of a criminal offence, as to which, see CAUTION; and 1 Hale, P. C. 304, as to such confessions in the case of treason.

A judicial confession is not necessarily a confession of legal guilt, but of the facts charged instead of denying them, and may amount to an admission claiming the verdict of a jury. So it does not preclude the culprit from taking exception to the indictment or moving in arrest of judgment, nor is it a bar to the grant of a special case for the Court for Crown Cases Reserved (*R. v. Brown*, 1890, 24 Q. B. D. 357). The law as to demurrer, which confesses the facts, is a further illustration of this rule (Hawk., P. C. 334, bk. ii. c. 31, s. 5).

(f) A confession or admission by a person when called as a witness is, as a general rule, admissible against him on a charge for committing the offence committed if made freely and voluntarily, and after proper caution that he is not bound to criminate himself (*R. v. Garbett*, 1847, 1 Den. Cr. C. 236; *R. v. Mercer*, 1818, 2 Stark. N. P. 366).

Under certain statutes a man is bound to answer criminating questions, but usually the Act prohibits the use against a man of a confession thus extracted; though the prohibition does not prevent prosecution on evidence obtained in consequence of such a confession.

Extra-Judicial Confessions.—Extra-judicial confessions are voluntary admissions of guilt made elsewhere than in a Court of justice, and not obtained by fear, folly, ignorance, or inducement from a person in authority. See ADMISSION IN CRIMINAL CASES.

There are innumerable decisions on the particular facts which will or will not constitute a fatal inducement collected in Archbold (21st ed.), 261–267. They may be classified as (1) admissions to police officers or persons who have the accused in custody, or are making inquiry of him on suspicions entertained; (2) admissions to masters or employers against whom the offence is supposed to have been committed. Threats by such persons to take the accused before a magistrate, or suggestions that it will be better to make a clean breast of it, and the like, are destructive of the admissibility of a confession so extracted. It is said that where the offence is not against a master or employer a confession by a servant to him, even on inducement, is admissible (*R. v. More*, 1852, 21 L. J. M. C. 199). This rests on the supposed rule that exhortations, admonitions, or threats from persons not directly concerned in the apprehension, prosecution, or examination of the accused are not to be taken account of. Many authorities exist for this rule (*R. v. Taylor*, 1839, 8 Car. & P. 733), which can be justified only by judge-made laws, since all the lieges in theory are equally entitled and concerned to bring offenders to justice; and the rule needs to be narrowly guarded in its application. Thus a confession made by a woman under pressure from her husband would be rejected even if she repeated it in Court (27 Ass. pl. 50).

As to confessions by a penitent, see CONFESSION AND ABSOLUTION.

As to confessions to medical men, see *Wilson v. Rastall*, 1792, 4 T. R. 753; 2 R. R. 516. Admissions of guilt to a legal adviser stand in a different position. While a lawyer consulted as to the means of committing a crime is not entitled to claim privilege, a lawyer retained to defend a person accused of crime is privileged absolutely, if the client so desires, from

giving any evidence as to statements or admissions made to him by his client, nor can he get rid of the privilege by discharging himself from the retainer (*R. v. Cox*, 1885, 14 Q. B. D. 153). See also ADMISSIONS; CAUTION; PRIVILEGE.

[*Authorities*.—2 Hale, P. C. 225; Archbold, 21st ed., 261–267; Russ. on *Crimes*, 6th ed., vol. iii. p. 477; Mayne, *Crim. Law of India*, 1896, p. 918.]

Confession and Absolution.—The Church of England distinctly recognises two kinds of confession and absolution—(a) public or general; and (b) private or particular.

(a) Public or general confession forms a part of the congregational share in the daily Order for Morning and Evening Prayer, and in the Office for the Holy Communion. The correlative absolution the rubrics direct to be pronounced at Morning or Evening Prayer “by the priest alone,” at the Holy Communion “by the priest (or the bishop being present),” in both cases excluding a deacon. This absolution is of a declaratory or ministerial character.

(b) Private or particular confession with its correlative absolution is included under the Sacrament of Penance in Art. xxv. It is not one of the two Sacraments of the Gospel “generally (*i.e.* universally) necessary to salvation” (Church Catechism).

But it is clearly enjoined in the case of individual doubt or scruple (see the Exhortation in the Holy Communion Office, and the Homily of Repentance), and a Form is expressly provided in the Office for the Visitation of the Sick. This absolution is of a discretionary or judicial kind, and its granting or withholding is a part of the commission conferred in terms at the Ordination of Priests. The Prayer-Book (including the Ordinal) is part of the statute law of the land, and it is thus a legal as well as an ecclesiastical duty on the part of any priest, having the cure of souls, to hear the confession of any parishioner who desires it, whether as a preliminary to presenting himself at the Holy Communion, or, in the case of a sick person, in consequence of being “moved” thereto by the priest, as directed by the Rubric.

An important question has been periodically mooted, but never authoritatively decided, Whether the confession of a penitent is privileged from disclosure in evidence? As regards a priest of the Church of England, he would commit an ecclesiastical offence in disclosing such a confession (see Canon 113 of 1603). It is not at all clear that legal compulsion could be employed to force disclosure. The leading text-writers are in direct conflict on the question. Compare Best on *Evidence*, 8th ed., 1893, pp. 532–535, with Pitt-Taylor on *Evidence*, 9th ed., 1895, p. 596. [See PRIVILEGED COMMUNICATIONS.]

The judicial *dicta* in England are also conflicting. As against an alleged ruling of Buller, J., in *R. v. Sparkes*, must be set the doubts of Lord Kenyon, C.J., in *Du Barré v. Livette*, 1791, Peake, 108; 3 R. R. 655; of Best, C.J., in *Broad v. Pitt*, 1828, 3 Car. & P. 518; of Alderson, B., in *R. v. Griffin*, 1853, 6 Cox, C. C. 219.

As to the pre-Reformation usage, there is no doubt but that statements made to a priest, under seal of confession, were privileged from disclosure. This has never been seriously controverted, and the question thus resolves itself into an inquiry whether the privilege formerly existing has since been taken away.

In *R. v. Hay*, 1860, 2 F. & F. 4, Hill, J., differentiated between what

was done and what was said. If this distinction be sound, what is said is still privileged. See the lucid note of the late Mr. Finlason appended to the report of this case.

The practice of private confession undoubtedly fell into comparative desuetude in the eighteenth century so far as regarded the Church of England; while at the same time Roman Catholics in England laboured under severe penal restrictions. So it is not surprising that the Courts of law did not go out of their way to recognise a privilege which would hardly have been openly claimed. And it was just during this period that the judge-made law of evidence was being built up. Still, the privilege did subsist in theory, and might have been set up in practice.

On the whole, while recognising the very grave doubts of learned writers, there would seem to be good ground for the expectation advanced in *Phill. Eccl. Law*, 2nd ed., 1895, i. 547, that "when this question is again raised in an English Court of justice, that Court will decide it in favour of the inviolability of the confession, and expound the law so as to make it in harmony with that of almost every other Christian State."

Confession and Avoidance.—See AVOIDANCE, PLEA IN CONFESSION AND.

Confession, Judgment by.—See COGNOVIT ACTIONEM.

Confession of Defence.—See DEFENCE.

Confidential Communications.—See PRIVILEGED COMMUNICATIONS.

Confirmation.—See BAPTISM; CHRISTIAN NAME; CONGÉ D'ÉLIRE.

Confiscation (*Confiscari*) in the Roman law meant seizing or taking into the hands of the emperor, and transfer to the Imperial *fiscus* or Treasury. It appears to have been applied equally to land and goods (3 Co. Inst. 227). In English law, forfeiture (*forisfactura*) is the term ordinarily applied to the exercise of this right. Coke (3 Inst. 227) regards *confiscata* and *forisfacta* as synonymous terms, and Blackstone (1 Com. 299) adopts his opinion. But in other old authors a distinction was drawn between forfeiture and confiscation. Goods and lands were said to be forfeited only on attainder; and the forfeiture might be to the immediate lord of the attainted person, and did not necessarily involve confiscation into the king's hands. Staundforde (*Pl. Cor.* bk. iii.) distinguishes between *biens confisques*, waiffe, and forfeiture (cc. 24, 25, 26). *Bona vacantia*, waifs (*bona waviata*), and goods found in possession of an alleged felon, and disclaimed by him, or goods the proceeds of a crime not claimed by the appellor in an appeal of robbery or larceny, were said to be confiscated. As to confiscation of lands for crime or in default of heirs, see ESCHEAT; as to confiscation of goods, see FORFEITURE. The estreat of recognisances is always described

as forfeiture, and not as confiscation. Charters are sometimes said to be confiscated when revoked by *scire facias*.

2. Under certain classes of statutes, particularly those relating to customs, excise, and explosives, power is given to confiscate or forfeit goods in respect whereof a breach of the law is committed (see CUSTOMS; EXCISE; EXPLOSIVES). The risk of confiscation for breach of port regulations or revenue laws is not taken by insurers (see 2 Arnould, *Marine Ins.*, 6th ed., 840).

3. The Crown is said to have the right of eminent domain to confiscate or appropriate the lands of the lieges for the defence of the realm (see EMINENT DOMAIN). A similar prerogative existed under the title of PURVEYANCE, but is now abolished, except as to the right to impress vehicles for military purposes.

4. The right of confiscation in theory extends to the property of alien enemies found within the realm during a state of war, but in practice is exercised in moderation, if at all (see Wheaton, *Int. Law*, ed. Boyd, s. 298).

5. In its popular sense, confiscation means either robbery under forms of law, with the sanction of the sovereign power; or depriving a man under parliamentary authority of his property, with or without adequate compensation.

[*Authorities*.—Jacob, *Law Lex*, s.v. "Confiscata"; Vin. *Abr.*; Bac. *Abr.*]

Conflict of Law and Equity.—Before the Judicature Act, 1873, the rules of common law and equity with reference to certain matters (some of which are more particularly referred to below) were at variance, though it has been doubted whether there are any principles of law which were differently affirmed in the Court of equity and the Courts of common law, which, dealing with the same matters for the purpose of different remedies, necessarily looked at those matters from different points of view (see per Lord Esher, M. R., in *In re Terry & White's Contract*, 1886, 32 Ch. D. at pp. 20, 21). Upon the passing of the Judicature Act, 1873, advantage was taken of the union of the several Courts whose jurisdiction was thereby transferred to the High Court of Justice, to amend and declare the law to be thereafter administered in England as to certain matters therein mentioned, including the following. The legal right which a tenant for life without impeachment of waste had to commit what is known as "equitable waste," such as the felling of ornamental timber, was taken away, unless expressly conferred by the instrument creating his estate. No merger can now take place by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity (see *Snow v. Boycott*, [1892] 3 Ch. 110). At common law a chose in action was not generally assignable, but in equity such an assignment operated by way of agreement to permit the assignee to use the name of the assignor. Now, any absolute assignment by writing under the hand of the assignor (not by way of charge only) of any debt or other legal chose in action, of which express notice in writing is given to the debtor or person liable, is effectual in law (subject to any prior equities) to pass and transfer the legal right to the debt or chose in action, and all legal and other remedies for the same. See ASSIGNMENTS OF CHOSSES IN ACTION. At law, time was always of the essence of the contract, but in equity only where expressly stipulated or necessarily implied, except as to mercantile contracts (see per Cotton, L.J., in *Reuter v. Sala*, 1879, 4 C. P. D. at p. 249).

In questions relating to the custody and education of infants, the rules of equity prevail. And generally in all other matters in which there was any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity now prevail (J. A., 1873, s. 25). The Judicature Acts did not abolish the distinction between law and equity, or enact that legal and equitable rights should be treated as identical, but the Court is now a Court of complete jurisdiction, and administers both legal and equitable principles (see *Pugh v. Heath*, 1882, 7 App. Cas. at p. 237; *Joseph v. Lyons*, 1884, 15 Q. B. D. at pp. 285-287).

In addition to the examples given above, the following cases will serve to illustrate the operation of the Judicature Acts in this respect.

The equity rule established by the House of Lords in *Darston v. Lord Orford* (1702, Pr. Ch. 188, Colles, 229) now prevails both at law and in equity, and therefore if an executor or administrator, after commencement of a creditor's action, and before judgment, voluntarily pays any creditor in full, he will be considered as having made a good payment, and will be allowed it in passing his account (per Jessel, M. R., in *In re Radcliffe*, 1878, 7 Ch. D. 733; followed in *Vibart v. Coles*, 1890, 24 Q. B. D. 364; and see *In re Wells*, 1890, 45 Ch. D. 569).

Where a Court of equity would compel specific performance (*q.v.*) of an agreement for a lease (see LANDLORD AND TENANT) by the execution of a lease, the case of a tenant in possession under such an agreement must now be treated both in the Equity and Common Law Divisions as if such a lease had been actually granted (*Walsh v. Lonsdale*, 1882, 21 Ch. D. 9; *Swain v. Ayres*, 1888, 21 Q. B. D. at p. 293; *Lowther v. Heaver*, 1889, 41 Ch. D. at p. 264). But this equitable doctrine can be applied only where the Court has concurrent jurisdiction in law and equity (see *Foster v. Reeves*, [1892] 2 Q. B. 255). In a case under the Statute of Limitations, the effect of an order of foreclosure as vesting for the first time the equitable title in the person who previously as mortgagee had the legal estate, must now be recognised in the High Court, assuming that there would previously have been any conflict on this point between law and equity (*Heath v. Pugh*, 1881, 6 Q. B. D. 345, 362; 1882, 7 App. Cas. 235, 237).

At law a contract under seal could be discharged only by performance, or by a contract also under seal. According to the rule in equity, accord and satisfaction (*q.v.*) must now be taken to be an answer to an action for a specialty debt (*Steeds v. Steeds*, 1889, 22 Q. B. D. 537).

The doctrine laid down in *Tulk v. Moxhay*, 1848, 2 Ph. Ch. 774, as to the enforcement in equity against a purchaser with notice of a covenant restrictive of the user of land, independently of the question whether the covenant does or does not run with the land at law, will now prevail, and wherever the facts admit of it, such cases must, it seems, be decided upon the question of notice alone (see Smith, *Leading Cases*, 10th ed., pp. 85, 86).

As to matters of practice, where no special provision is contained in the rules of the Supreme Court, and there is a variance between the former Chancery and common law practice, the most convenient rule is to prevail. Sec. 25 of the Judicature Act, 1873, does not refer to rules of practice.

Conflict of Laws is a short title to describe that branch of the private law of nations which deals with cases in which differing laws of different communities come into collision. On the continent of Europe it is usually called PRIVATE INTERNATIONAL LAW (*q.v.*).

Prof. Dicey, examining the relative value of the two terms, gives an example of the kind of case in which a "conflict" arises: "H. and W., Portuguese subjects, are first cousins. By the law of Portugal they are legally incapable of intermarriage. They come to England, and there marry each other in accordance with the formalities required by the English Marriage Acts. Our Courts are called upon to pronounce upon the validity of the marriage. If the law of England be the test, the marriage is valid; if the law of Portugal be the test, the marriage is invalid. The question at issue, it may be said, is whether the law of England or the law of Portugal is to prevail." Here we have a conflict, and the branch of law which contains rules for determining it may be said to deal with the conflict of laws, and be, for brevity's sake, called by that title. The defect, however, of the name is that the supposed "conflict" is fictitious, and never really takes place. If English tribunals decide the matter in hand, with reference to the law of Portugal, they take this course not because Portuguese law vanquishes English law, but because it is a principle of the law of England that, under certain circumstances, marriages between Portuguese subjects shall depend for their validity on conformity with the law of Portugal (*Conf. of Laws*, p. 12).

Of the expression Private International Law, he says it "is handy and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign law which prevails in all civilised countries"; but it is inaccurate, confounding as it does "two classes of rules which are generically different from each other. The principles of international law, properly so called, are truly 'international,' because they prevail between or among nations; but they are not in the proper sense of the term 'laws,' for they are not commands proceeding from any sovereign. On the other hand, the principles of private international law are 'laws' in the strictest sense of that term, for they are commands proceeding from the sovereign of a given State."

Prof. Holland objects to the term, because it "should mean, in accordance with that use of the word 'international' which, besides being well established in ordinary language, is both scientifically convenient and etymologically correct, 'a private species of the body of rules which prevails between one nation and another.' Nothing of the sort is, however, intended; and the unfortunate employment of the phrase, as indicating the principles which govern the choice of the system of private law applicable to a given class of facts, has led to endless misconception of the true nature of this department of legal science" (*Jurisprudence*, 7th ed., 370).

Other more accurate terms have been proposed (see Prof. Holland's *Jurisprudence*, p. 370), but none of them have proved as convenient as those in question.

Prof. Westlake prefers the term Private International Law, which he adopts without discussion, and Prof. Woolsey justifies its use on the following grounds: "It is called *Private* because it is concerned with the private rights and relations of individuals. It differs from territorial or municipal law, in that it may allow the law of another territory to be the rule of judgment in preference to the law of that territory in which the case is tried. It is *International* because, with a certain degree of harmony, Christian States have come to adopt the same principles in judicial decisions, where different municipal laws clash. It is called *Law*, just as Public International Law is called, not as imposed by a superior, but as a rule of action freely adopted by the sovereign power of a country, either in consideration of its being so adopted by other countries, or of its essential justice. And this adoption may have taken place through express law,

giving direction to Courts, or through power lodged in the Courts themselves (*Inter. Law*, ed. 1879, s. 73).

We shall follow Professors Westlake and Woolsey in dealing with the rules governing the subject under INTERNATIONAL LAW, PRIVATE (*q.v.*).

[*Authorities*.—Dicey, *Conflict of Laws*, 1896; Story, *Conflict of Laws*, 7th ed.; Holland, *Jurisprudence*, 1880; Fœlix, *Traité de Droit International Privé ou du Conflit des lois*, Paris, 1843.]

Confusion.—In the civil law this was one of the modes of acquiring rights of property in accordance with the principle of *Accession* (*q.v.*). It took place when the liquors or fluids of two or more owners became mixed or combined so as to be practically inseparable, and thus differed from *Commixture* (*q.v.*), which denoted a similar mixing of solids. The rule was that if several persons voluntarily intermixed their wines or other liquids, the resulting mixture became, apart from express agreement to the contrary, the common property of such persons; and the same rule prevailed when fluids became accidentally intermixed (Just. Inst. 2. 1. 27; Dig. 41. 1. 7, 8, 9). In these cases each co-owner, if he chose, could at any time force a separation of his share by the action termed *communi dividundo*. On the other hand, if one intentionally mixed the fluids of others with his own, the others could, it would appear, still only claim their proportionate shares, allowing for differences of quality. In English law similar principles are observed except that in the last-mentioned case there would certainly be alternative rights to claim the value of the property lost or damages. In the important class of cases referring to flowing water, however, there are somewhat special rules. Thus all who have a right of access to a watercourse (*flumen vel cursus aquæ*) may, though they have no independent right of property in the water of such watercourse, yet use the same reasonably, and acquire an absolute right to quantities reasonably abstracted (*Embrey v. Owen*, 1851, 6 Ex. Rep. 353). An action, too, lies against any trespasser even though no appreciable damage is sustained (*Bickett v. Morris*, 1866, L. R. 10 H. L. 47), unless his use is warranted by some statutory power (*Proprietors of River Medway v. Earl of Romney*, 1861, 9 C. B. N. S. 575), or unless he has made his right good by prescription for twenty or forty years under 2 & 3 Will. iv. c. 71, s. 2. What is a watercourse is a question of fact in every case, the main elements being a regular channel and flood (*Dudden v. Clutton Union*, 1857, 1 H. & N. 627), and so also is what amounts to a reasonable use (*Earl of Sandwich v. Great Northern Rwy. Co.*, 1875, 10 Ch. D. 707; *A.-G. v. Great Eastern Rwy. Co.*, 1870, L. R. 6 Ch. 572, and *Miner v. Gilmour*, 1858, 12 Moo. P. C. 131). But standing and percolating water extending over several properties will be governed by the rules first above stated (cp. *Holker v. Porrit*, 1875, L. R. 10 Ex. 59, and *Chasemore v. Richards*, 1859, 7 H. L. 349).

Congé d'Élire (Norman-French, *Congé d'eslire*), leave to elect, is the name of the royal licence to a dean and chapter to proceed to the election of a bishop on the vacancy of an English See. In the appointment to bishoprics in England, the normal mode is that of election and confirmation. A provisional mode by letters patent is applicable to certain Sees founded within the last twenty years in which no capitular body yet exists. (See DEAN AND CHAPTER.)

In England, as in other Christian countries in which Church and State

are united, the civil power from very early times claimed and exercised a controlling voice in the appointment of bishops, which has crystallised into a right analogous to that of a private patron to present a fit clerk to a benefice. This right rests in both cases on the principle of foundation. (See ADVOWSON.)

The Act 25 Hen. VIII. c. 20 (repealed by 1 Edw. VI. c. 2, but re-enacted by 1 Eliz. c. 1, s. 2) now contains the statutory requirements on the subject. By sec. 3, at every avoidance of every archbishopric or bishopric, the sovereign may grant to the dean and chapter "a licence under the Great Seal as of old time hath been accustomed, to proceed to the election of an archbishop or bishop of the See so being void, with a letter missive containing the name of the person which they shall elect and choose." The dean and chapter "shall with all speed and celerity in due form elect and choose the same person . . . and none other." In default of election by the dean and chapter beyond twelve days, the sovereign shall nominate by letters patent. By sec. 4, the person so elected "shall be reputed and taken by the name of lord elected of the said dignity or office," and on his making the appointed oaths, the sovereign by letters patent under the Great Seal shall signify the said election to the archbishop of the province, requiring and commanding such archbishop, "*to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto.*" The section then provides that the election of an archbishop shall be signified "to one archbishop and two other bishops or else to four bishops," requiring them "*to confirm the said election,*" etc. By sec. 6, if the dean and chapter proceed not to election within twenty days after receiving the licence, or if any archbishop or bishop do not *confirm*, invest, and consecrate within twenty days after receiving the letters patent, then "every dean and particular person of the chapter, and every archbishop and bishop, and all other persons so offending or doing contrary to this Act or any part thereof, and their aiders, counsellors, and abettors, shall run in the dangers of pains and penalties of the statute of the provision [*quære* provisors] and præmunire" (see 25 Edw. III. st. 5, c. 22, and 16 Rich. II. c. 5). (As to how far these pains and penalties are now in force, see PRÆMUNIRE.) It is noticeable that the references to confirmation in secs. 4 and 6 (italicised above) are interlined in the original Act.

On the avoidance of a See by death, translation, or resignation (as to which, see the Bishops' Resignation Act, 1869, 32 & 33 Vict. c. 111), the dean and chapter certify the vacancy to the Crown in Chancery and pray for the *congé d'élire*. The three canonical modes of election are acclamation, (otherwise called inspiration), scrutiny, and compromise. (As to how far these forms are obligatory, see ECCLESIASTICAL LAW.) After election, the chapter certify the result to the Crown, the archbishop, and the bishop-elect. The Crown thereupon signifies the Royal assent by letters patent directed to the archbishop and all other bishops concerned. It is material to observe that these letters patent contain no sort of reference to the letter missive, but treat the capitular election as unfettered, and proceeding solely by virtue of the *congé d'élire*. The letters patent are in effect a mandate to proceed to confirmation and consecration. The act of consecration requires, both by canon law and by the rubrics of the common Prayer-Book, which have statutory authority, the presence of at least three bishops. The confirmation of episcopal elections has lately given rise to considerable discussion, and there may be said to be two main views of it. The one view is that it is a mere ministerial duty on the part

of the archbishop, or his vicar-general, and that the tribunal is strictly limited to an inquiry as to the identity of the person elected with the person named in the letter missive, and as to the fact of such person's election. The other view is that confirmation is that without which the election is inchoate, and the consecration cannot properly proceed, and that thus the tribunal is entitled, and indeed by its own forms bound, to inquire into not only the identity, but also the fitness in a canonical sense of the person elected; as also into the regularity as well as the validity of the election. The narrower view found expression in the deliverances of the Commissaries (Dr. Burnaby, V.G., Dr. Lushington, and Sir John Dodson) appointed by Archbishop Howley in 1848 for the confirmation of Dr. Hampden, bishop-elect of Hereford. On an application for a *mandamus* to the archbishop to hear and determine objections, the Court of Queen's Bench was equally divided—Lord Denman, C.J., and Erle, J., being against the rule absolute, Patteson and Coleridge, JJ., for it. No order, therefore, was made (*R. v. Archbishop of Canterbury*, 1848, 11 Q. B. 483; 6 St. Tri. (N. S.) 409; *Jebb's Report*).

It is conceived that the High Court would, on a similar application, re-examine the question *de novo* [see *The Vera Cruz* (No. 2), 1884, 9 P. D. 96]. In the subsequent case of Dr. Temple, bishop-elect of Exeter, (1869), Sir Travers Twiss, V.G., held, after argument, that he had no power to hear objections directed against the orthodoxy of the person elected (Phill. *Eccl. Law*, 2nd ed., i. 45). On the other hand, all the forms used at a confirmation, especially the citation and praconisation of opposers, point to its being a genuine judicial inquiry. It would seem to represent the primitive consent of the provincial bishops and of the laity. And the Statute 25 Hen. VIII. c. 20, which pressed the royal supremacy to its extreme limits, coupled confirmation with consecration in the same category as spiritual acts. It is hardly conceivable that a layman or a priest under thirty years of age (see *Preface to Ordinal*) must be confirmed and consecrated by the metropolitan within twenty days after receiving the letters patent.

It is sometimes said (*e.g.* Cripps, *Church Law*, 6th ed., p. 79) that the five Sees founded 1541-42 by Henry VIII. (viz. Bristol, Gloucester, Chester, Peterborough, and Oxford) and those of Ripon and Manchester, founded by virtue of the Ecclesiastical Commissioners Act, 1836, 6 & 7 Will. IV. c. 77, have always been pure donatives in form as well as substance. But if the analogy suggested above exists between the sovereign and a private patron, it may be pointed out that an owner of a donative by once presenting makes the benefice *ipso facto* presentative. And all those seven Sees have regularly been filled by election and confirmation since their foundation. See also the special provisions of the Bishopric of Bristol Act, 1884 (47 & 48 Vict. c. 66), s. 3, subs. (1) and (4).

In the cases of the six Sees of recent foundation, viz. St. Alban's, 1876 (under 38 & 39 Vict. c. 34); Truro, 1877 (under 39 & 40 Vict. c. 54); Liverpool, 1880; Newcastle, 1882; Southwell, 1884; and Wakefield, 1888 (under the Bishoprics Act, 1878, 41 & 42 Vict. c. 68), it is provided that so long as there is not a dean and chapter, Her Majesty may appoint the bishop by letters patent, and those letters patent shall be made in the like manner, so far as circumstances admit, and have the same effect as letters patent of Her Majesty nominating a bishop in the case of a bishopric where a dean and chapter have not proceeded to elect a bishop in accordance with the licence and letters missive of Her Majesty (see 25 Hen. VIII. c. 20, s. 3), and that from and

after the foundation of such dean and chapter a vacancy in that bishopric shall be filled in the same manner as a vacancy in any other bishopric in England.

In pursuance of these enactments the Crown for the present appoints directly by letters patent to the Sees of St. Alban's, Liverpool, Newcastle, Southwell, and Wakefield. In the case of Truro, a chapter has been founded under the Truro Chapter Act, 1878, 40 & 41 Vict. c. 44. The bishopric of Truro has thereby become elective, and a *congé d'élire* issued in the usual form for the election of the present bishop in 1891.

[*Authorities*.—See Bingham, *Antiquities of the Christian Church*, bk. ii. c. 16; Godol. *Rep. Can.* 22; Ayl. *Parergon*, 240; Gibs. *Cod. i.* 104.]

Congregationalist.—See NONCONFORMIST.

Congress (Diplomacy).—A meeting of representatives of sovereign Powers to discuss and regulate common interests.

The term "conference" is used where the matters upon which the Powers are called to deliberate are of a more or less technical character, or do not involve general policy. Thus the diplomatic assemblages at Berlin in 1885, for the settlement of trade on the Congo and Niger, that of Brussels in 1890, on the African slave-trade, etc., are called conferences; whereas that of Berlin in 1878, on Turkish affairs, is called a congress.

This distinction has not always been followed in practice, and several conferences between two Powers only bear erroneously in history the name of Congresses. The first great European Congress seems to have been that of Westphalia in 1648. (See BALANCE OF POWER.)

In the present century, since concerted action (see CONCERT, EUROPEAN) has become a method of diplomacy, congresses and conferences of the Great Powers have become frequent. The Congress of Vienna in 1815 resettled the map of Europe after the disruption caused by the Napoleonic wars; that of Aix-la-Chapelle in 1818, of Laybach in 1820, and of Vienna in 1822, arose out of the work of Vienna.

The Congress of Paris in 1856 dealt with the Christian communities of Turkey (see also DECLARATION OF PARIS), and that of Berlin in 1878 with the nationalities and territorial distribution of the new States of the Balkan Peninsula.

The conferences on postal and telegraphic arrangements, on fisheries, copyright, industrial property, quarantine, etc., have been numerous. Only those States which sign the resolutions are bound by them; there is no implied obligation arising from participation by any Power in the deliberations to be bound by the majority upon any point.

Rivier's *Principes* (cited below) contains a full account down to the present date of the preliminary procedure, ceremonial, deliberations, resolutions, and protocols (*q.v.*) of congresses and conferences. M. Poincard, secretary of the *Bureau International de la propriété intellectuelle*, has published the first volume (see below) of a treatise devoted to the conventions which have been concluded at these conferences, and which have now become a formidable body of international regulations.

[*Authorities*.—Rivier, *Principes du Droit des gens*, Paris, 1896, vol. ii. pp. 8 *et seq.*; Holtzendorff, *Handbuch des Völkerrechts*, Hamburg, 1887, vol. iii.; Twiss, *Law of Nations in Time of Peace*, Oxford, 1884; Phillimore, *International Law*, vol. iii., London, 1873; Charles de Martens, *Guide*

diplomatique, vol. iii.; Poincard, *Droit International Conventionnel*, Paris, 1894.]

Conjugal Rights.—See RESTITUTION OF CONJUGAL RIGHTS.

Conjuration.—The invocation or conjuration of any evil spirit. This was made felony by 33 Hen. VIII. c. 8, and under that and subsequent statutes many persons were condemned to death for the alleged practice of conjuration and other kinds of witchcraft. Prosecutions for these supposed crimes were abolished by 9 Geo. II. c. 5, but by sec. 4 of the same Act—a section which is still unrepealed, although practically obsolete—persons pretending to exercise any kind of witchcraft or conjuration are liable to imprisonment for one year.

Connivance.—See DIVORCE.

Conquest (Int. Law) is the forcible appropriation by one Power of territory belonging to another. The completion of the act of appropriation followed by a declaration of annexation vests the title of sovereignty in the conquering Power, but until some such definite announcement or proclamation has been made of an intention to keep the conquered territory, the conquering Power have only the rights of *occupation*, and not of sovereignty.

Consanguinity.—Consanguinity, or relationship by blood, is of two kinds: (1) *Lineal*, as between ancestors and descendants in a direct line; and (2) *Collateral*, as between the stocks descended from a common ancestor. Lineal consanguinity, however remote, is a bar to marriage. Collateral consanguinity is a bar to the third degree computed according to the reckoning of the civil law (see *Lock v. Lake*, 1757, 2 Lee, 420). Thus, cousins-german, or first cousins, being only related in the fourth degree, may intermarry. See 32 Hen. VIII. c. 38. The authority of the Table of Prohibited Degrees compiled by Archbishop Parker in 1563, and the state of the law before 1835, are discussed under AFFINITY (*q.v.*).

All marriages within the prohibited degrees, whether of consanguinity or affinity, are now absolutely null and void by the Marriage Act, 1835, commonly called "Lord Lyndhurst's Act."

The only distinction drawn by that Act between consanguinity and affinity was as to past *de facto* marriages, those of affinity becoming statutorily unimpeachable, while those of consanguinity were left to the operation of the Ecclesiastical Courts.

Half-blood relationships constitute consanguinity equally with those of the whole blood; and the prohibitions attach as between an illegitimate person and the natural relations of such person (*R. v. Inhabitants of Brighton*, 1861, 1 B. & S. 447).

[*Authorities.*—See Gibs. *Cod.* i. 412; Pollock and Maitland, *History of English Law*, ii. 383; Hammick, *Marriage Law of England*, 30; Bishop, *Marriage and Divorce*, i., s. 262.]

Conscience Clause.—See EDUCATION.

Consecrated Ground.—Ground set apart for the purposes of burial by the act of consecration (see CONSECRATION). All existing churchyards are deemed to have been, and all new ones must be, consecrated. (Whitehead, *Church Law*, p. 73). Provision has been made by the Cemeteries Clauses Act, 1847, s. 23, for parts of cemeteries being consecrated for the burial of members of the Established Church; in the Burial Acts of 1852 and 1857 there are similar provisions as to burial grounds; and by the Consecration of Churchyards Act, 1867, provision is made for additions to existing churchyards. Ground once consecrated cannot be secularised except by statute (*R. v. Twiss*, 1869, L. R. 4 Q. B. 412). By recent Open Spaces Acts many disused burial grounds within the metropolis have been unconsecrated and converted into recreation grounds. See BURIAL GROUND; CHURCHYARD.

Consecration.—This term is employed in relation to both persons and things, and means the setting apart for sacred purposes.

Consecration of Archbishops and Bishops.—The form used in the ordaining or consecrating of an archbishop or bishop is given in the Book of Common Prayer. Till consecration an archbishop or bishop cannot sue for his temporalities; and, upon consecration, benefices held by him before his election become vacant. See Cripps, *Church and Clergy*, 6th ed., p. 81. See ARCHBISHOP; BISHOP; CONGÉ D'ÉLIRE.

Consecration of Churches, Churchyards, etc.—A competent endowment must be provided before a church can be consecrated. There is no prescribed form for the consecration of churches, churchyards, etc., but a form in general use is given in Phillimore's *Ecclesiastical Law*, 2nd ed., vol. ii. pp. 1391 *et seq.* In the case of additions made to existing churchyards, the Consecration of Churchyards Act, 1867, provides that, instead of the usual service, the bishop may sign an instrument of consecration, which has the same legal effect as a sentence of consecration.

Consecutive Sentences.—See CUMULATIVE SENTENCES.

Consensus gentium is the common standard of conduct among civilised communities upon which intercourse among them is based.

Consent.—See CONTRACT.

Consent Order.—A consent order is not itself a contract, although the consent itself is (*Wentworth v. Bullen*, 1829, 9 Barn. & Cress. 840; *Conolan v. Leyland*, 1884, 27 Ch. D. 632; 54 L. J. Ch. 123).

By the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 49, no appeal from a consent order is allowed except by leave of the Court or judge making such order; and by sec. 100 of the same Act, "Order" shall include "Rule."

Such an order is sufficient evidence of there being a contract between

the parties, and it may be pleaded as an estoppel (*South American and Mexican Company*, [1895] 1 Ch. 37; 63 L. J. Ch. 803).

A consent order once given cannot arbitrarily be withdrawn; but an application may be made for relief on the ground of mistake or surprise or for other sufficient reason (*Harvey v. Croydon Union Rural Sanitary Authority*, 1884, 26 Ch. D. 249; 53 L. J. Ch. 707; *Joint Committee of River Ribble v. Croston Urban District Council*, [1897] 1 Q. B. 251, per Wright, J., p. 256). Nor will the Court set aside such an order if the rights of third parties be prejudiced thereby (*The Belcairi*, 1885, 10 P. D. 161; 55 L. J. P. 3).

When an order has been passed and entered, it will only be set aside for the same reasons as the contract itself (*A.-G. v. Tomline*, 1878, 7 Ch. D. 388; 47 L. J. Ch. 473).

An order made under a common mistake or by fraud can be set aside (*Huddersfield Banking Company v. Lister*, [1895] 2 Ch. 273; 64 L. J. Ch. 523).

The Court of Bankruptcy can go behind such an order (*Ex parte Lennox*, 1886, 16 Q. B. D. 315; 55 L. J. Q. B. 45). Counsel and solicitors can usually consent on behalf of their clients (*Matthews v. Munster*, 1888, 20 Q. B. D. 141; 57 L. J. Q. B. 49). See ADVOCATE.

In the Q. B. D. the consent upon which the order is drawn up must first be initialled by the judge or master making the order (P. M. R. r. 20).

The order must be filed and show that it is a consent order.

By 32 & 33 Vict. c. 62, s. 27, and 41 & 42 Vict. c. 31, s. 13, a consent order whereby the plaintiff is authorised to sign or enter upon judgment must be registered in the Bills of Sale Department, Central Office, by the master, within twenty-one days of the order (*Gowan v. Wright*, 1887, 18 Q. B. D. 201; 56 L. J. Q. B. 131; *In re Smith*, 1888, 20 Q. B. D. 321; 57 L. J. Q. B. 212).

[*Authorities*.—For further information, see the *Annual Practice*; Seton, *Judgments and Orders*, 5th ed., p. 111; 39 Sol. Jo. pp. 260, 279, 294.]

Consent (to Commission of Offences).—See ABOMINABLE CRIME; ABDUCTION; AGE, PRESUMPTIONS AS TO; ASSAULT; LUNACY; RAPE.

Consequences.—In the phrase “warranted . . . free from all consequences of hostilities, riots,” etc., “consequences” means *proximate* consequences (*Ionides v. Universal Marine Insurance Co.*, 1863, 14 C. B. N. S. 259).

Conservancy.—See RIVERS; THAMES.

Consideration.—See CONTRACT; BILLS OF EXCHANGE; BILLS OF SALE.

Consistory Court.—The Consistory or Consistorial Court, or more shortly the Consistory (*consistorium*), is the tribunal wherein the ordinary forensic jurisdiction of the bishop is exercised. Such a Court exists, as of course, in every diocese in England, except Canterbury, wherein the dio-

consan Court is styled, by reason of its limited jurisdiction, the Commissary Court, the archbishop's metropolitan jurisdiction being exercised in the Court of Arches (*q.v.*). As to origin of Consistory Courts, see ARCH-DEACON. By the patent appointing the officer commonly known as the Chancellor, a title which, though hardly ever found in the patent, receives statutory recognition in the Elizabethan Act of Uniformity (1 Eliz. c. 2), s. 23, the bishop usually commits all jurisdiction to him, whether contentious or voluntary, under two separate offices, those of Official-Principal (*q.v.*) and Vicar-General (*q.v.*). The two offices have from time to time in practice become confused, and the titles have been consequently used somewhat indiscriminately; but, broadly speaking, this distinction between them is inherent, and has always been traceable, viz. that the contentious jurisdiction belongs to the official-principal, the voluntary jurisdiction to the vicar-general. Both jurisdictions may be said to be in a sense judicial, being derived from the bishop as *judex ordinarius*. But the strictly forensic office, viz. that of hearing and determining causes between party and party, is that which is exercised by the chancellor of the diocese (*quid* official-principal) in the Consistory Court. For instance, applications for faculties which now form the staple business of Consistory Courts, are, even if actually unopposed, strictly forensic, being commenced by citation calling on all persons having an interest to oppose. The seal of the Consistory Court is often affixed to various documents, *e.g.* Licences (*q.v.*), which, it is conceived, are not in reality acts of the Court. This practice is probably due to Canon 124 of 1603 limiting chancellors to one seal. Prior to 1858 the Consistory Courts had within their several dioceses concurrent jurisdiction with the Courts of their respective provinces in matters testamentary and matrimonial. But by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), and the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the ecclesiastical jurisdiction in both classes of matters ceased as from 1st January 1858. Its former existence is, however, important to be borne in mind for matters of research. The Church Discipline Act, 1840 (3 & 4 Vict. c. 86), abrogated the criminal jurisdiction of the Consistory Courts over clerks in holy orders; but the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), provides that for "an offence against morality, not being a question of doctrine or ritual," a clergyman may be prosecuted and tried "in the Consistory Court of the diocese in which he holds preferment." On the scope of this Act, see *Bishop of Rochester v. Harris*, [1893] Prob. 137, and *Lee v. Flack*, [1896] Prob. 138, reversed in *P. C. sub nom. Beneficed Clerk v. Lee*, [1897] App. Cas. 226. (See also DISCIPLINE, ECCLESIASTICAL.)

In general an appeal lies from the sentence of a Consistory Court to the proper Provincial Court, *i.e.* either the Arches Court of Canterbury or the Chancery Court of York. Under the Statute of Appeals (24 Hen. VIII. c. 12, s. 6) such appeal must be interposed within fifteen days of sentence. In cases under the Clergy Discipline Act, 1892, an appeal of either party on a question of law, or of the defendant (with leave of the Appellate Court) on a question of fact, lies, at the option of the appellant, either to the Provincial Court, or to the Queen in Council (s. 4).

The patents of the chancellors of the various dioceses differ very considerably. Their terms (as in 1882) are set out in the Appendix to the Report of the Ecclesiastical Courts Commissioners made in 1883. It is noticeable that in many dioceses there is an express reservation to the bishop granting the patent, and his successors, to execute the office either alone or with the chancellor. This reservation is probably made in compliance with Canon 11 of 1640. (As to the legal validity of the Canons of 1640,

see ECCLESIASTICAL LAW.) Notwithstanding the existence of such a reservation, the fact of the bishop's interest in a suit is no ground for prohibiting the Consistory Court from proceeding (*Ex parte Medwin*, 1853; 1 EL & BL 609). Solicitors have now the full right of practising in all Consistory Courts. See Solicitors Act, 1877 (40 & 41 Vict. c. 25, s. 17). For the officers of the Consistory Court, see REGISTRAR, PROCTOR, and APPARITOR. The rules of practice in the various Consistory Courts are very divergent. A useful list of them (as in 1895) will be found in Phillimore's *Ecclesiastical Law*, 2nd ed., vol. ii. pp. 998–1001. The special practice under the Clergy Discipline Act, 1892, is regulated by the Clergy Discipline Rules, 1892, for which see ST. R. & O. (1892), 258.

[*Authorities*.—Godol. *Rep. Can.* 83; Gibs. *Codex*, i. xxv, and ii. 986; Ayliffe, *Parergon*, 160, 395.]

Consolato del Mare.—A code, ascribed to the fourteenth century and Barcelona (Pardessus), of the usages governing the intercourse of the maritime communities of the Mediterranean. It is generally agreed that the *Consolato*, though more or less consecutive in form, was not a law promulgated by any governing authority, but “a judicious collection of almost all the maritime usages which had been previously observed by the different trading republics of the Mediterranean for ages preceding its date; and had from the equity, and utility, and convenience of its rules, been voluntarily adopted by all these maritime states, as a body of consuetudinary or common maritime law” (Reddie, p. 46). Many of its articles passed into the French *Ordonnance sur la Marine* of 1681, and thence, through the *Code of Commerce*, into many of the legislations of Europe.

[*Authorities*.—Chr. Robinson, *Collectanea Maritima*, London, 1801, containing a translation into English of the chapters of the *Consolato* relating to Prize Law; Pardessus, *Collection des lois maritimes antérieures au 18^e siècle*, ii. ch. xii., containing a French translation of the *Consolato*; Reddie, *Researches Historical and Critical in Maritime International Law*, Edinburgh, 1844, pp. 45 *et seq.*; Wheaton, *History of the Law of Nations*, New York, 1845, Introduction; Hautefeuille, *Histoire du droit Maritime*, Paris, 2nd ed., 1869, pp. 133 *et seq.*; Hosack, *Rise and Growth of the Law of Nations*, London, 1882, pp. 164 *et seq.*]

Consolidated Fund.—The Consolidated Fund of Great Britain and Ireland is the account of the Exchequer kept at the Bank of England and the Bank of Ireland, into which all the revenue collected by the four great departments of the Customs, the Inland Revenue, the Post Office, and the Commissioners of Woods and Forests, as well as other moneys received directly or indirectly by other departments in the course of their business, are paid, and out of which all public payments are made. This revenue includes the Customs, Excise, Stamps, Land-tax, and House Duty, Property and Income-tax, the Post Office and Telegraph Service receipts, Crown lands, and a group of miscellaneous items amounting to over £3,000,000, or about one-thirty-fourth of the whole revenue. It is paid into the bank mainly through the Inland Revenue Office.

Before the Act 27 Geo. III. c. 13, in 1787, which constituted the Consolidated Fund, the proceeds of the taxes were carried to separate and distinct funds, but this Act directed that they should be carried to, and constitute, the Consolidated Fund. Not only the duties and taxes, but loans

raised when the taxes are insufficient to meet the annual expenditure, are also paid to the account of the Exchequer for the credit of the Consolidated Fund. It is the gross, not the net proceeds, which are thus paid in; this being made obligatory by sec. 10 of the Exchequer and Audit Departments Act, 1866, 29 & 30 Vict. c. 39, which provides for the management of the Consolidated Fund by the Exchequer and Audit Departments. The only exception is, that the salaries of employees in the revenue departments are paid for in the first instance out of revenue receipts, and these advances are afterwards paid out of the parliamentary votes for the various departments.

The payments out of the Consolidated Fund are of two kinds: 1. those made by authority of permanent grants under various Acts of Parliament; 2. those made pursuant to annual votes in committee of supply. The former are called the Consolidated Fund Services; the latter the Supply Services. The services provided for under the first head are (a) the National Debt, including the funded and unfunded debt (see FUNDS); (b) the civil list (*q.v.*); (c) annuities to the Royal Family, and pensions; (d) salaries and allowances of certain independent officers; (e) the salaries of judges in Great Britain and Ireland; (f) certain miscellaneous services.

In regard to this class of services and the supply services, full details are given in the annual finance accounts. The grants for the supply services are provided for according to estimates presented to the House of Commons in Committee of Ways and Means. The resolutions making these grants, upon being adopted by the House, are embodied in bills once or twice during the session, which ultimately, in the ordinary course, become Ways and Means Acts or Consolidated Fund Acts, and give parliamentary authority for the payment of public money while the session is going on. Finally, the Appropriation Act embodies these previous Acts, sets out the votes in detail, and appropriates to them specifically the sums received from the Consolidated Fund. Thus all payments out of the Fund are made by and under the authority of some Act of Parliament.

[*Authorities.*—See Anson, *Law and Custom of the Constitution*; Dicey, *Law of the Constitution*; and Todd, *Parliamentary Government in England*. See also article ACCOUNTANT TO THE CROWN.]

Consolidated Rules.—When several orders *nisi* for informations in the nature of *quo warranto* have been granted against several persons for usurpation of the same office and all upon the same grounds of objection, the Court may order such orders to be consolidated and only one information to be filed in respect of all of them (Crown Office Rules, 1886, r. 58).

Consolidated Stock.—Government or other stocks which have been consolidated into one fund. The most familiar instance of consolidated stock is the Consolidated Annuities (Consols), which represent a number of different stocks issued by the Government at different periods and rates of interest which were first consolidated in the reign of George II.

Under the Companies (Clauses) Act, 1845, power is given to public companies, with the consent of three-fifths of the votes of their shareholders, to convert or consolidate all or any part of their fully-paid shares into a general capital stock, to be divided amongst the shareholders according to their respective interests therein (s. 61); and by the Metropolitan Board of Works (Loans) Act, 1869, the Metropolitan Board of Works, which is now

represented by the London County Council, was empowered to create and issue capital stock to be called Metropolitan Consolidated Stock.

Consolidation of Actions.—Causes or matters pending in the *same* Division of the High Court may be consolidated by order of the Court or a judge (R. S. C., Order 49, r. 8). The application is usually made by summons, which can be heard, in the Q. B. D. by a master, and in the P. D. and A. D. by a registrar (Order 54, r. 12). One summons should be taken out entitled in all the actions (*Ward v. Pomfret*, 1840, 1 Sco. N. R. 410 n.; 1 Mac. & G. 559; see *Chitty's Forms*, p. 223), and it may be done at any time after appearance (*Hollingsworth v. Brodrick*, 1836, 4 Ad. & E. 646; 6 N. & M. 240; *Booth v. Payne*, 1841, 1 Dowl. N. S. 348).

Actions in the High Court in which the parties are the same may now be consolidated on the application of the plaintiff (*Martin v. Martin & Co.*, [1897] 1 Q. B. 429; 45 W. R. 260), or, as under the practice before the Judicature Acts, by the defendant. The making of an order is left to the discretion of the judge at chambers (*ibid.*).

After consolidation, only one set of pleadings is necessary, and the consolidated actions proceed as if they were one action.

It appears that where many actions are oppressively and vexatiously brought by the same plaintiff for the purpose of trying the same question, the Court or a judge will interfere, either by staying the proceedings or giving time to plead in all the actions but one upon terms, or in some other way (*Chitty, Archbold*, p. 408). And see ABUSE OF PROCESS.

So where many actions are brought by different plaintiffs against the same defendant for the same matter, one will be made a test action for all (*Amos v. Chadwick*, 1877, 4 Ch. D. 869).

[See STAY OF PROCEEDINGS and TEST ACTION.]

Libel Actions.—Where actions are brought by the same plaintiff for the same or substantially the same libel against several defendants, they may be consolidated and tried together. The jury assess the whole damages (if any), and apportion it among the several defendants (51 & 52 Vict. c. 64, s. 5).

Bankruptcy.—Where two or more bankruptcy petitions are presented against the same debtor, or against joint debtors, the Court may consolidate the proceedings or any of them on such terms as the Court thinks fit (46 & 47 Vict. c. 52, s. 106).

In Admiralty.—The Admiralty Division exercises a larger power of consolidation than that conferred by Order 49, r. 8. The Court of Admiralty had, and the Admiralty Division has, power to consolidate any actions the decision of which depends on the same facts. So where several actions are brought against a ship by different plaintiffs in respect of one collision they may be consolidated (*The William Hutt*, 1860, Lush. 25; and see *The America and Syria*, 1874, L. R. 4 Ad. & Ec. 226). In salvage actions, consolidation is not limited to cases where the rights of the various claimants depend upon the same facts or arise out of services of the same description, but may be ordered whenever the actions arise out of services rendered to the same ship in relation to the same peril (*The Strathgarry*, [1895] Prob. 246; 64 L. J. P. 59; 11 R. 732). In such cases consolidation will be ordered whenever it appears to be convenient, without regard to the consent of the parties, and without holding out any threat as to costs (*ibid.*). The consolidated actions proceed as one, but when the interests of one of the plaintiffs in a consolidated salvage suit is adverse to the interests

of the other plaintiffs, separate counsel on his behalf may be heard at the hearing of the consolidated cause (*ibid.* and *The Scout*, 1872, L. R. 3 Ad. & Ec. 514 n.). As to the costs of appearing by separate counsel, see *The Longford*, 1881, 6 P. D. 60; 50 L. J. Adm. 28; 29 W. R. 491.

In the County Courts the judge may order consolidation (upon such terms and conditions as may be just) of several actions brought by the same plaintiff against the same defendant in the same Courts, in respect of different causes of action which might have been joined in one action (C. C. Rules, Order 8, rr. 1 and 4).

Where the plaintiffs are different but the defendant the same, and the actions arise out of the same breach of contract or wrong, the defendant may apply to have all the actions except one stayed, on undertaking to be bound by the result of the selected action (*ibid.* r. 2).

If several actions of contract be brought in the same Court by the same plaintiff against several defendants, and the event of the actions depends on the finding of the judge or jury on some question common to all, the judge may at any time select one action for trial and stay the others; but the judgments in the selected action will not bind any of the parties in the other action (*ibid.* r. 7).

Consolidation of Appeals.—Appeals from decisions of revising barristers (as to which, see 6 & 7 Vict. c. 18; 41 & 42 Vict. c. 26; and 51 Vict. c. 10) may be consolidated when the validity of a number of claims or objections depends upon the same point of law and the same state of facts (6 & 7 Vict. c. 18, ss. 44 and 45; *Prior v. Waring*, 1847, 5 C. B. 56; 17 L. J. C. P. 73; *Wilson v. Salford Town Clerk*, 1868, L. R. 4 C. P. 398; 38 L. J. C. P. 35; 17 W. R. 161).

If all the parties have given notice of appeal, the barrister may declare that the appeals ought to be consolidated, and he must then state in writing the case and his decision thereupon, and that several appeals depend upon the same decision and ought to be consolidated. He may name any person interested and consenting, in behalf of himself and all other persons interested, to be appellant or respondent. The appellant and respondent must declare in writing that they appeal and agree to prosecute the appeal on behalf of all the persons' interests whose names are written under the declaration. The names and particulars of the qualifications of the persons interested follow. The overseers or town clerk may be named as respondents.

Consolidated appeals are conducted as a single appeal, and an agreement for contribution to the costs may be made a rule of Court.

If a consolidated appeal is not duly prosecuted or answered, the Court or a judge may give the conduct of the appeal or of the answer to other persons interested.

If any person objects to have his appeal consolidated with others with which the revising barrister has declared it ought to be consolidated, he may refuse, but in such case, though he is liable to pay costs, he is not entitled to get his costs from the other party without an order of the Court.

Privy Council.—The judicial committee will consolidate appeals at any stage if it appears convenient that they should be heard together. An appeal was struck out and ordered to be consolidated with two other appeals arising out of the same will, but in a suit which had not been instituted till a year after the first appeal had been admitted (*Hiddingsh v. Denysen*,

1886, 12 App. Cas. 107; and see *In re the A.-G. for Victoria*, 1866, L. R. 1 P. C. 147).

Consolidation of Mortgages.—The doctrine of consolidation is as to mortgages made after the commencement of the Conveyancing and Law of Property Act, 1881 (in the absence of expressed intention), excluded by sec. 17, subsec. (1), which is as follows: "A mortgagor seeking to redeem any one mortgage shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem." But by subsec. (2) it is enacted that this is only to apply if and so far as a contrary intention is not expressed in the mortgage deeds or one of them. It is a common practice in mortgages to exclude the application of sec. 17, so that the law is still material.

Consolidation is sometimes called "tacking," as in the marginal note in *Vint v. Padgett*, 1858, 2 De G. & J. 611; one of the leading cases on consolidation; but the two are distinct, though both often occur in the same case (see *Bovey v. Skipwith*, reported 1 Ch. Cas. 201), which also shows that both were established as long ago as the reign of Charles II.

Consolidation is the right of the holder of two mortgages on different properties, when the time fixed for redemption has passed, and the equities of redemption are vested in the same person, to retain the two until the amounts due on both are paid off. It arises where each mortgage debt is a distinct charge on only one property, and the right is to retain each property until payment, not only of the debt which is charged on it, but also that which is not charged on it.

The doctrine of tacking mortgages applies where there are three or more mortgage debts charged on the same property, and the owner of one of the subsequent mortgages acquiring the legal estate is allowed to tack his subsequent mortgage to a prior mortgage so as to take priority over an intermediate mortgage. The right of tacking arises from the rules which "allow superior force and strength to a legal title" (*Marsh v. Lee*, 1682; 2 Vent. 337; 2 Wh. & Tu. L. C. Eq.). The right of consolidation is founded on the mortgagor's having occasion to come into equity in order to redeem, and depends on the power of the Court to put its own price on its assistance, to grant redemption (see per James, L.J., in *Cummins v. Fletcher*, 1880, 14 Ch. D. 708). It only applies when the mortgagor has to rely on the equity to redeem (see per Lindley, L.J., in *Chesworth v. Hunt*, 1880, 5 C. P. D. 271).

"The principle of the doctrine is that a person who comes into equity must do equity, and if he has a mortgage of £300 on one estate, and £600 on another, and the time of redemption being past, the mortgagor comes to equity to redeem or the mortgagee to foreclose, the mortgagee is entitled to say, 'I will not part with one estate until I am paid all owing to me on both.' Of course, he cannot say so if the mortgagor comes within the time limited by the deed for payment, in which case the equitable doctrine has no application, but if he has allowed that time to pass and has no legal rights, then the equitable doctrine applies" (S. C.).

Application to Equitable Mortgages.—It applies, however, to equitable as well as to legal mortgages. "It has long been settled that the right of consolidation may be exercised by the transferee of the mortgages as well as by the original mortgagee, and may be exercised in respect of equitable

mortgages as well as by a mortgagee holding the legal estate absolute at law; and, on the other hand, that it may be asserted against the assignee of an equity of redemption from the mortgagor as well as against the mortgagor himself" (per Lord Davey in *Pledge v. White*, [1896] App. Cas. 192). See also as to its application to equitable mortgages, *Neve v. Pennell*, 1863, 2 Hem. & M. 170; and in the case of a mortgage by deposit, *Cracknall v. Janson*, 1879, 11 Ch. D. 1.

Foreclosure Actions.—As appears from *Cracknall v. Janson* (*ubi supra*), it applies equally in foreclosure as in redemption suits. See also per James, L.J., in *Cummins v. Fletcher*, 1879, 14 Ch. D. 698; *Watts v. Symes*, 1858, 1 De G., M. & G. 240; *Selby v. Pomfret*, 1861, 1 John. & H. 336, on app., 3 De G., F. & J. 595; *Neve v. Pennell*, 1863, 2 Hem. & M. 170.

As against Assignees of one or more of the Equities of Redemption.—There has been much litigation on the question how far the doctrine applies as against the assignees from the mortgagor of the equity of redemption in one or both of the mortgaged properties. The leading case on the subject is *Vint v. Padgett*, 1858 (1 Gif. 446; 2 De G. & J. 611), where there were distinct mortgages by the same mortgagor of two different properties to two different persons. The equity of redemption in part of one of the properties and of the whole of the other property was then mortgaged to the defendants, and subsequently the two first mortgages became united by transfer to the plaintiffs with notice of the second mortgage to the defendant. It was held that the plaintiffs were entitled to consolidate. Here, therefore, the two first mortgages were created before, but first became united after, the assignment of the two equities.

Nothing seems to have turned on the fact that the equity of redemption in only a part of one of the properties was comprised in the second mortgage. The case is treated as an authority for the proposition that where the two first mortgages have become united in title in the same person, if the equity of redemption in both properties mortgaged has become vested in the same person, although the two first mortgages first united after, and with notice of the second mortgage, the right of consolidation attaches, and the doctrine to this extent has been affirmed by the subsequent case in the House of Lords (cp. *Pledge v. White*, [1896] App. Cas. 194).

In the case of *White v. Hillacre* (1839, 3 Y. & C. Ex. 597), before the title to the two first mortgages of the separate properties became united in the same person the equity of redemption in the properties had been separated and become vested in two different persons. It was held by Alderson, B., that the person holding the two mortgages could not consolidate, and that the right of separate redemption was not lost.

In *Beevor v. Luck*, 1867, L. R. 4 Eq. 537, V. C. Wood disapproved of the decision in *White v. Hillacre*, and held that a mortgagee of one property might as against an assignee of the equity of redemption of another property, consolidate with his mortgage a mortgage from the same mortgagor on that other property of which he had taken a transfer after the date of the assignment of the equity of redemption of the second property only, but this decision (*Tassell v. Smith*) has been overruled; cp. cases cited *infra*.

In *Tassell v. Smith*, 1858, 2 De G. & J. 713, there was first a first mortgage to trustees for an insurance company of one property; next, a second mortgage of the same property to a subsequent mortgagee, who did not give notice to the first mortgagees; then, a first mortgage of another property to other trustees for the same insurance company, without notice of the second mortgage of the first property. The fact that the second was

a mortgage to separate trustees was treated as immaterial, and it was held that the insurance company, as equitable owners of both, had a right to consolidate as against the second incumbrancer of one of the properties. Here the mortgage of the second property was taken without notice of the second mortgage on the first property, and this was noticed by L. J. Turner as material. See also as to this the judgment of Hall, V.C., in *Baker v. Gray*, *infra*.

In *Baker v. Gray*, 1875, 1 Ch. D. 491, the case was similar to *Beevor v. Luck* and *Tassell v. Smith*, in the fact that the first mortgage on the second estate was not in existence at the time of the second mortgage of the first estate, but when the mortgage of the second property was taken the mortgagee had notice of the second mortgage of the first property. V. C. Hall disallowed the claim to consolidate, and distinguished the case from *Tassell v. Smith* on this ground that in *Tassell v. Smith*, when the insurance company took the mortgage on the second mortgage, they had no notice of the first mortgage.

It is to be observed that Hall, V.C., in *Baker v. Gray* considers that *Tassell v. Smith* might be supported on the ground of want of notice. In the case of *Jennings v. Jordan*, *infra*, Lord Selborne seems to treat it as possible that *Tassell v. Smith* might be supported on the facts; and in *Pledge v. White*, noticed below, in delivering judgment in the House of Lords, Lord Davey refers to *Beevor v. Luck* as founded on a misunderstanding of *Tassell v. Smith*. It seems very doubtful, however, having regard to recent cases, whether, when there is no express agreement for consolidation, *Tassell v. Smith* can be supported on the ground that there was no notice when the mortgages were united of the second mortgage on the first property, at any rate in cases relating to land where notice is not material in order to perfect title against a subsequent incumbrancer. Since the Conveyancing Act of 1881, however, in order to exclude sec. 17, it is a common practice to insert an express provision that the mortgagee may consolidate, and it seems in such case, if the mortgagee took the legal estate without notice of a previous incumbrance on the other property, an argument might be raised that he had an equitable right by express contract.

In *Mills v. Jennings*, 1880, 13 Ch. D. 639, the Court of Appeal decided that consolidation could not be allowed where the first mortgage of the second property was created after a second mortgage of the first property; Cotton, L.J., however, said, "It is true that a mortgagee of one estate may get in, and consolidate the mortgage of another estate against the purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages were executed previously to the sale of the equity of redemption of one of the estates." The judgment of the Court of Appeal was affirmed by the House of Lords (*sub nom. Jennings v. Jordan*, 1881, 6 App. Cas. 698), but they did not recognise this distinction; and it is pointed out by Lord Davey in *Pledge v. White*, [1896] App. Cas. 196, they preferred the decision in *White v. Hillacre* to that of Wood, V.C., in *Beevor v. Luck*.

Shortly after the decision in *Mills v. Jennings*, the case occurred in *Harter v. Colman*, 1882, 19 Ch. D. 630, of both the first mortgages of the two properties being created though not united before the assignment of the equity of redemption in one of them; and Fry, J., after discussing the cases, held that in such case there could be no consolidation. The decision is no doubt correct, but the broad principle on which Fry, J., based his judgment, namely, that the purchaser of an equity of redemption takes it subject only to such equities as were subsisting at the date of his deed,

must be qualified in the case where the purchaser takes two equities of redemption subject to distinct mortgages.

In *Minter v. Carr*, [1894] 3 Ch. 498, the mortgagor had made several mortgages of eight different properties, and Pledge, from whom the plaintiff claimed, had become entitled to the equity of redemption in all of them, but had obtained this in property A. from one Stunt, who had taken his mortgage of A. before the union of the mortgages, and the plaintiff claimed that as Stunt had the right to redeem property A. separately, this was still subsisting in the plaintiff, though he had obtained the equity of redemption in the other properties. It was held by Romer, J., and the Court of Appeal [1894] 2 Ch. 321, and [1894] 3 Ch. 498, that the plaintiff's contention was correct, and that he was entitled to redeem property A. without redeeming the others.

Minter v. Carr therefore affirmed the doctrine of *White v. Hillacre* and *Harter v. Colman*, *supra*, that where the equities of redemption were separately assigned before the union of the first mortgages, the holder of them could not consolidate against the purchaser of one of the equities, and that his right to redeem would pass to his assignee, though that assignee also took all the equities of redemption in the other properties. In *Pledge v. White*, [1896] App. Cas. 187, the Court had to consider whether this doctrine applied, as regards the seven other mortgages, the equities of redemption in which had vested in Pledge after the union of the mortgages, in the defendant or his predecessors in title. Pledge claimed to redeem one of them. The House of Lords affirming Romer, J., and the Court of Appeal held that the defendants were entitled to consolidate. Lord Davey discussed the authorities in a valuable judgment, and distinguished the case from those of purchases of one of the equities, as follows:—"It appears to me, my Lords, that an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only.

"He knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand. If the doctrine of consolidation be once admitted, it appears to me not unreasonable to hold that a person in such a position occupies the place of the mortgagor or assignor to him towards the holders of mortgages subject to which he has purchased, although it may be unreasonable to hold that he can be affected by the transfer to such holders of the mortgages to other persons by the same mortgagor or property which he has not purchased, and with the equity of redemption of which he has no concern. He does not investigate into title to such other property, and cannot know in the latter case to what mortgages the property is subject. If your Lordships affirm the decree now under appeal, the doctrine of consolidation will be confined within at least intelligible limits.

"It will be applicable (1) where at the date where redemption is sought all the mortgages are united in one hand, and redeemable by the same person; or (2) where after that state of things has once existed, the equities of redemption have become separate."

In addition to these two propositions the House of Lords in this case distinctly laid down that the case of *Vint v. Padgett* had been too long established to be overruled, and was a binding authority, and approved of the decision in *Harter v. Colman*, *ubi supra*. So that it may be treated as settled that the right of consolidation attaches, although at the date when the two mortgages are united the transferee has notice of the second

mortgage or sale of the equities of redemption in both of them (*Vint v. Padgett*, 2 De G. & J. 611; *Tweedale v. Tweedale*, 1857, 23 Beav. 341).

And that the right does not attach if the equity of redemption in one only of the properties has become vested in a separate person before the union of the two first mortgages, whether they had or not been created before the assignment of the equity (*Harter v. Colman*, 1882, 19 Ch. D. 630).

It has also been held that the right to consolidate did not, under the old doctrine as to purchasers under 27 Eliz. c. 4, enable the mortgagor to upset a voluntary settlement of one of the mortgaged properties effected before the union of the mortgages (*In re Walhampton Estate*, 1884, 26 Ch. D. 391).

Bankruptcy of the Mortgagor.—In *Selby v. Pomfret*, 1861, 1 John. & H. 336, before Wood, V.C., and before Campbell, L.C., 3 De G., F. & J. 595, the mortgagor became bankrupt before the union of two separate mortgages made by him on different properties. It was held that the holder of the two mortgages was entitled to consolidate against the assignees in bankruptcy. See the case discussed by Lord Davey in *Pledge v. White*, [1896] App. Cas., see p. 194.

Doctrine not Applicable where one of the Properties has ceased to exist.—It has also been decided that the right of consolidation cannot be claimed where one of the properties has ceased to exist, *i.e.* that the holder of a mortgage on property, the interest in which is subsisting, cannot claim to hold that property until a debt is paid which was charged on another property, the interest on which has ceased to exist, *e.g.* in the case of a security redeemed by a person against whom the right of consolidation did not attach (see per Selborne, L.C., in *Jennings v. Jordon*, 1881, 6 App. Cas. 707); or a leasehold which had determined (*In re Raggett, Ex parte Williams*, 1880, 16 Ch. D. 117); or an annuity which had ceased (*In re Gregson, Christison v. Bolam*, 1887, 36 Ch. D. 223).

These were cases of claims by the mortgagee against creditors of the mortgagor. It must be borne in mind, that as against the heir or devisee of the mortgagor, in order to avoid circuitry of action, a mortgagee has a right to tack to his security unsecured debts due from the mortgagor.

Consolidation has been allowed in cases where the mortgagee claiming to consolidate has sold one or both properties under his power as mortgagee; see *Selby v. Pomfret*, *supra*, 1861, 3 De G., F. & J. 595; *Cracknall v. Janson*, 1871, 11 Ch. D. 1, where a first mortgagee claimed the proceeds of sale by a second mortgagee, and on being paid, handed over to the second mortgagee a separate equitable security, and it was held that the second mortgagee was entitled to consolidate; and see *Marshall v. Shrewsbury*, 1875, L. R. 10 Ch. 250, where the mortgagee, claiming to consolidate, had agreed to sell both properties.

In *Griffith v. Pound*, 1890, 45 Ch. D. 553, it was allowed where the mortgagee, claiming to consolidate, had given notice to pay off the money owing on one of the mortgages.

As against Sureties.—The holder of two mortgages cannot consolidate against a surety for one of them of whose rights he had notice when he took one of the mortgages, *e.g.* if the surety joined in the mortgage deed (*Bowker v. Bull*, 1851, 1 Sim. N. S. 29; see also *Forbes v. Jackson*, 1882, 19 Ch. D. 615). But it has been held that he can do so if, when the mortgages united and his claim to consolidate accrued, he had no notice (*In re Toogood*, 1889, 61 L. T. 19).

Mortgages in different Rights.—In *Cummins v. Fletcher*, 1880, 14 Ch. D. 699, James, L.J., said, there can be no consolidation between a mortgage by

A. for his own debt, and a mortgage by A. and B. of other property for their partnership debt (see also observation by the same judge in *In re Raggett*, 1880, 16 Ch. D. 110, see p. 119). See MORTGAGE for authorities.

Consolidation of Statutes.—The term “consolidation,” as applied to statute law, means the combination in a single measure of enactments relating to the same subject-matter, but scattered over different Acts.

For this purpose mere paste and scissors consolidation seldom suffices. Its result would be, in many cases, alteration of meaning. It also tends to prolixity and ambiguity.

Literal reproduction often means substantial alteration. An Act of Parliament speaks with reference to the time at which and the circumstances under which it is passed. The language of three hundred or even of fifty years ago would often have an entirely different meaning if reproduced in an Act of the present day. The mere collocation of enactments of different dates alters the sense.

The enactments to be reproduced are often unduly prolix, and even where that is not so, the net result of a long series of amendments of the law can frequently be summed up very briefly.

The language of different Acts, even when they relate to the same subject-matter, is often not uniform. The same expressions are differently defined, and are given different meanings by the context. Hence alteration of language is necessary for the sake of clearness and consistency.

For all these reasons the work of consolidation can seldom be effected mechanically. The law has to be re-written in such a form as to preserve its substance whilst altering its form. But care has to be taken to preserve the material language, unless there is any special reason for altering it, and specially to preserve, if and as far as possible, expressions on which a judicial construction has been placed, or which have acquired a particular signification in practice.

It is, however, rarely possible to reproduce existing statute law without some slight alteration of substance. Ambiguities and inconsistencies have to be removed; modern machinery has to be substituted for machinery which has become obsolete or inconvenient. Alterations of this kind may properly be described as necessarily incidental to the process of consolidation; and, if their nature is fully and fairly explained, objection will probably not be raised on the ground that the measure goes beyond the proper scope of consolidation. A consolidation bill ought therefore to be accompanied by a memorandum and notes on clauses showing what alterations of this kind are made by the bill.

In order to make sure that the existing enactments have been fully reproduced, and that nothing has been overlooked, a reference to each section reproduced is usually given on the margin of each reproducing clause, and there is also a separate table of the enactments repealed and superseded, showing where each repealed section is reproduced, or if it has not been reproduced, on what ground it has been omitted. There is thus a double check on the accuracy of the consolidation. The marginal reference shows whence the new law is derived; the table of comparison shows how the existing law is accounted for.

Experience shows that under existing conditions of English parliamentary government, consolidation should not be combined with substantial amendment of the law. Where a bill aims both at consolidation

and at amendment, it is practically impossible to confine proposals for amendment to the new provisions as distinguished from those which are merely reproductions of existing law. The whole bill becomes open to criticism and amendment in committee, and if the subject is in the least degree contentious, the chances of passing it are very small.

Where amendment of substance as well as of form is needed, one of three courses may be adopted. An amending bill may be introduced, and, when passed, followed by a consolidation bill. Or, when the provisions of the amending bill are past the committee stage, they may be embodied in a consolidation bill. This course was adopted with the Housing of the Working Classes Act, 1890, and the Public Health (London) Act, 1891, but is attended by many risks, and is difficult to combine with the more recent practice of referring consolidation bills to a joint committee of both Houses. Or, lastly, it may be more expedient to make consolidation precede substantial amendment, an assurance being given that re-enactment of the existing law is not in any way to prejudice or preclude future amendments. The fact is that simplification of the form of the law facilitates amendments of substance.

There is often difficulty in determining the boundary lines of a consolidation bill, in saying what enactments it should or it should not reproduce. Each bill of this kind ought to be regarded as a chapter in an ideal code, and considered in its relations to kindred branches of the law. It should be considered before a provision is inserted, whether it might not find a more appropriate place in another chapter; before it is omitted, where else it could be better placed if kindred branches of the law were consolidated. But theoretical considerations of this kind must often give way to considerations of policy. It is frequently better to have incomplete consolidation than no consolidation at all, and to avoid enactments which it would be dangerous under existing circumstances to touch.

The headings of the index to the statutes will often suggest what enactments should be combined in a single consolidation bill. It may be convenient to have a separate table showing what enactments, though related to the subject-matter of the bill, are left outstanding, and for what reasons they are so left.

It will be observed from what has been said that the task of consolidating the statute law, if properly performed, is usually one of considerable labour and difficulty. It involves on the part of the draftsman accurate knowledge both of the past history and of the present state of the law. He must know not merely the letter of the law, but how it is interpreted in practice, and for that purpose must derive assistance not only from judicial decisions, but from the practical knowledge of those engaged in the administration of the law.

And when a measure of this kind has been prepared there is difficulty in getting it through Parliament. Governments are naturally reluctant to make themselves responsible for a class of measures for which there is no great demand, and members of Parliament are reluctant to take measures of this kind on trust, and are too apt to regard them as convenient opportunities for suggesting substantial amendments of the law. For the purpose of meeting these difficulties, the experiment has recently been tried of submitting consolidation measures to the joint committee of Lords and Commons, which was originally established for the consideration of statute law revision bills, with instructions to examine the measures for the purpose of seeing how far they are accurate reproductions of the existing law. Under this system the responsibility for deciding the difficult questions

which are sometimes raised by the juxtaposition of enactments in different statutes, and for determining whether a particular construction should be placed on an ambiguous expression or whether it is safer to "consolidate the doubt," rests with the committee. The experiment was eminently successful in the year 1894, when it resulted in the passing of four important consolidation Acts, including the Merchant Shipping Act with its 740 sections and 22 schedules. With respect to this Act, the joint committee reported that the bill as passed by them "reproduces the existing enactments, with such alterations only as are required for uniformity of expression and adaptation to existing law and practice, and does not embody any substantial amendment of the law." Parliament accepted this report as satisfactory, and the measure passed through the House of Commons without any difficulty or delay. Subsequent attempts to pass measures of consolidation have been less successful. However, in spite of the difficulties adverted to above, a reasonable number of consolidation measures have been passed within the last quarter of a century. Among them may be mentioned those relating to the Coinage, the National Debt, Stamps and Stamp Duties, the Customs, the Management of Taxes, the Slave Trade, Public Health, Weights and Measures, the Militia, Sheriffs, Coroners, Mortmain, County Courts, Commissioners for Oaths, Factors, Lunacy, Foreign Jurisdiction, Foreign Marriages, the Housing of the Working Classes, Municipal Corporations, Public Libraries, Trustees, Copyhold, Diseases of Animals, Merchant Shipping, Friendly Societies. Most of these Acts have been drawn in pursuance of recommendations by the Statute Law Committee, and through the agency of the Parliamentary Counsel's Office. A list of consolidation measures prepared and passed in recent years will be found in Appendix iv. to the Memorandums on Statute Law Revision and the Improvement of the Statute Law, which were published as a Parliamentary Paper in 1893 (C. 22).

Conspiracy.—This term, unlike combination (*q.v.*), is always used in English law *in malâ parte*, as importing an offence or a civil wrong.

The crime of conspiracy seems as such to be peculiar to English law. The Indian Penal Code, with one exception, avoids the use of the word "conspire," and the punishment as a crime of any conspiracy which does not proceed to execution of an illegal act or use of illegal means (Mayne, *Crim. Law of India*, 1896, p. 469). The exception is conspiracy within or without British India to wage war, or attempt to wage war, against the Queen, or to deprive her of her sovereignty in British India, or to overawe by criminal force, or the show of criminal force the Government of India, or any local government in India (s. 121). It was added to the Code in 1870 (Act xxvii. of 1870) by Sir J. Stephen as an equivalent for the Imperial Treason Felony Act, 1848 (11 & 12 Vict. c. 12), see 3 Stephen, *Hist. Crim. Law*, 308. For all other purposes that Code treats conspiracy as a mode of abetment (s. 108), and does not treat a conspiracy as abetment unless there is something done or omitted in furtherance of the common object which amounts at least to a preparation for the concerted crime (Mayne, *Crim. Law of India*, 1896, p. 435). • The English conception of the offence is thus stated by eminent judges.

"The offence consists not merely in the *intention* of two or more, but in the *agreement* of two or more, to do an unlawful act or to do a lawful act by unlawful means. So long as such design rests in *intention* only it is not indictable. When two agree to carry it into effect the very plot is

an act in itself, and the act of each of the parties promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or the use of criminal means. And so far as proof goes, conspiracy, as Grose, J., said (in *R. v. Brisac*, 1803, 4 East, 171; 7 R. R. 551) is generally 'a matter of inference deduced from certain criminal acts of the parties accused done in pursuance of the apparent criminal purpose in common between them. The number and the compact give weight and cause danger'" (*Mulcahy v. R.*, 1868, L. R. 3 H. L. 317, Willes, J.). "Conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or attempting to do some act to carry out that intention. Conspiracy, however, consists simply in the agreement or confederacy to do some act, whether it is done or not. We very often get facts sufficient to establish the guilt of parties to a conspiracy other than acts which have been done in pursuance of it, for example, there may be a conspiracy to set fire to London in several different places at once, and that conspiracy may be fully proved though no part of London has in fact been set on fire" (*R. v. Hibbert*, 1875, 13 Cox, C. C. 82-86, Cleasby, B.).

The furthest point to which the legal conception of this offence has been stretched was in *R. v. de Kromme*, 1892, 17 Cox, C. C. 492, where a man was held to have been rightly convicted of soliciting another to conspire to cheat his employer by selling goods at an under value. It is distinct from abetting (see ABETTOR), attempting (see ATTEMPT), or inciting to the commission of an offence.

In a very large number of cases it is unnecessary to resort to an indictment for conspiracy. Where the scheme is executed there is no need at all. Where the scheme has progressed so far as an attempt to commit the offence planned, the principal can be indicted for the attempt, and the counsellors or procurers (though co-conspirators) can be dealt with as principals where the attempt is treason or misdemeanour, or as accessories before the fact if it be felony. But where all that is done is preparation and the common design is abandoned or frustrated, but the design is such as to create a public danger, it may still be expedient to have resort to this criminal remedy. But quite apart from criticism of the accepted definition of its elements, the motives for resort to prosecution for this offence are too often (1) that it renders admissible against the accused a mass of evidence which could not be received against them if tried separately; (2) that it enables the prosecution, by putting them all in the dock together, to close their own mouths as witnesses for themselves or each other.

Sir James Stephen (*Dig. Crim. Law*, 5th ed., 39) deals with conspiracy as one of the degrees in the commission of crime, and defines it thus (art. 49): "When two or more persons agree to commit any crime they are guilty of the misdemeanour called conspiracy whether the crime is committed or not, and though in the circumstances of the case it would be impossible to commit it." This definition is by no means wide enough to cover all cases of indictable conspiracy. On the one side, it contains no reference to the statutory exceptions which make certain conspiracies felonious; on the other, the use of the limiting word "crime" narrows the established judicial definition of a conspiracy, which does not require that the act agreed to be done should be criminal if done by one person. And later on in his Digest he enumerates particular forms of common law conspiracy as substantive offences which would better appear as illustrations of the offence when adequately defined—*e.g.* art. 97 (seditious conspiracy), art. 15 (a) (conspiracy to defeat justice), art. 178 (conspiracy to carry out acts regarded by the judges as injurious

to the public), art. 195 (conspiracy to defile a woman), art. 365 (conspiracy to cheat, defraud, or extort), art. 440 (conspiracies to do an "unlawful" act in restraint of trade). The adoption of this classification by so eminent a jurist is evidence that the complexity of the subject trammelled even his vigorous intellect, and that even he had failed to construct out of the case law of centuries any coherent and united classification of the judicial dicta as to the nature and limits of conspiracy as a crime, although, as is shown by his historical account of the offence (3 *Hist. Crim. Law*, 201), he had fully grasped the nature of the subject.

The classification of conspiracies in the ordinary text-books (Archbold, 21st ed., 1100) is (1) falsely to charge another with a crime punishable at law either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him; (2) wrongfully to injure or prejudice a third person or any body of men *in any other manner*; (3) to commit any offence punishable by law; (4) to do any act with intent to prevent the course of justice; (5) to effect a legal purpose with a corrupt intent or by improper means; (6) to which may be added conspiracies or combinations by employers or workmen in the course of trade disputes. Of these (1) and (4) are in substance the same; so are (2) and (6); and (5) closely approaches them.

The only way to test the accuracy of the classifications of the jurist and the text-writer is to examine the history of the offence, which illustrates in a remarkable manner the continuous growth of judge-made law in the supposed interests of the community or the ruling classes and of the power and prerogative of the Crown.

In the Parliament Roll for 1290 (1 Rot. Parl. 48 *a*) is recorded a petition and answer as to officers of the city of London charged with conspiracies and machinations, and directing their amotion pending the trial of the complaint; and (1 Rot. Parl. 59) reference is made in a petition to John of St. Helens, formerly of counsel for the Abbot of Abingdon, who had been discharged (*amotus*) on the Berkshire eyre for conspiracy.

In 1293 (1 Rot. Parl. 96) occurs an ordinance concerning conspirators (not in Rev. Statutes), which shows that conspirators could be fined and imprisoned:—

"De illis qui conqueri voluerint de conspiratoribus in patriâ *placita* maliciose moveri procurantibus, ut contumelie braciatoribus (*sic*), *placita* illa et contumelias ut campi partem vel aliquod aliud commodum inde habeant malitiose manutenentibus et sustententibus veniant de cetero coram justic. *ad placita Domini Regis* assignatis et ibi securitatem de querelâ sua convenient. Et mandetur vice comiti per brevi capitalis justic. et sub sigillo suo quod attachientur quod sunt *coram Rege* ad certum diem: et fiat ibi celeris justitia et illi qui de hoc *convicti* fuerint puniantur graviter juxta discretionem justiciorum predictorum per prisonam et redemptionem aut expectant tales querentes iter justic. in partibus suis si voluerint et ibidem sequantur, etc."

The apparent effect of this is to make conspiracy a plea of the Crown.

It next appears in the *Articuli super Chartas* (1300, 28 Edw. I. c. 10), where it is stated that the king had already awarded a writ out of the Chancery in right of conspirators, false informers, and evil procurors of dozens assizes, etc., and where a further remedy is granted by allowing the justices in eyre or the judges of the Superior Courts when they go into any county to award inquests in respect of these wrongs without writ. This Act provides a civil and not a criminal remedy. The *ordinacio de Conspiratoribus* or *Diffinitio de Conspiratoribus*, attributed to 1305 (33 Edw. I. st. 2, Ruffhead, 1 Rev. Stat. 2nd ed., p. 61), does not create the punishment of con-

spiracy, which depends on the provisions of 1292, but merely defines conspiracy as then understood by king and Parliament. "Conspirators be they that *do confeder or bind themselves by oath or covenant or other alliance* that every of them shall aid and sustain the enterprise of the other falsely and maliciously, to indict or cause to be indicted or falsely to acquit people, or falsely to move or maintain pleas, and also such as cause children within age to appeal men of felony (see APPEAL OF FELONY), whereby they are imprisoned and sore grieved, and such as maintain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth; and this extendeth as well to the takers as the givers; and stewards and bailiffs of great lords, which, by their signory office or power undertake to maintain or support pleas or quarrels for parties other than such as touch the estate of their lords or themselves" (i.e. act corruptly or extortionately or partially in their office). The ordinance concludes with a direction that the justices assigned to hear felonies and trespasses in the several counties of England shall have a transcript. Except these last words, there is nothing in the ordinance declaring that conspiracy as defined is a misdemeanour. But no doubt it should be read with the provisions of 1292 and 1300 as applying both to pleas of the Crown and private remedies. The mischief at which it was directed was evidently the substitution of combinations to prevent justice in the king's Courts, which had then apparently begun to take the place of the settlement of disputes by private force, and the context of the ordinance in the statute-book which associates the offence with barratry, champerty, and maintenance supports this view. An Act of uncertain date printed by Ruffhead as St. 33 Edw. I., and styled the *Statutum de Conspiratoribus* (1 Rev. Stat., 2nd ed., 77), does not contain the term conspiracy, nor any word specifically applicable to it either in its civil or its criminal aspect.

By 1306 (1 Rot. Parl. 201) it is clear from the use of the word *indictati* in a petition that conspiracy was treated as an indictable offence, and it is there classed with other trespasses (*transgressiones*). The answer to the petition is the foundation of what is called the villainous judgment, as it forbids the putting upon any jury, inquest, or assize, a person convicted of making false confederacies, for maintaining falsehoods or procuring themselves for gain, to be put on an inquest before any officer of the Crown, to maintain a false party or accepting bribes from either side. This rule was more formally enunciated in 1314 (8 Edw. II., 1 Rot. Parl. 289), by what in form seems to be a statute. It permits the convicted conspirator to appear in Court only in his own cause, and gives a writ out in Chancery for disobedience to its provisions. It was repeated in 1315 (1 Rot. Parl. 299), and extended in 1344 (2 Rot. Parl. 142). Mr. Justice Wright says that this judgment was the ordinary judgment in attain (see *R. v. Spragge*, 1760, 2 Burr. 996, 1027), and the word attained is actually used in some of the cited entries; but the offence being a misdemeanour the common law Courts could not attain the accused of their own authority, whence no doubt the parliamentary directions above cited (see Hawk., P. C., bk. i. c. 72, s. 9). The sentence of greater excommunication was also fulminated against conspirators in this year (4 Rot. Parl. 421). In 1344 is recorded perhaps the earliest case of a trade conspiracy (1 Rot. Parl. 202), a conviction and fine before the King's Council for renewing (*qu. reforming*) a trade guild in York, and a consequent attempt to exclude the offenders from their burgess rights, which was stopped by the king.

The criminal and the civil remedy are distinctly recognised as enforceable in 1331, when directions were issued for a commission to inquire, hear, or

determine, as well at the suit of the Crown as that of the party, all conspiracies, etc., committed from 1 Edw. II. (2 Rot. Parl. 60). And in 1343 (2 Rot. Parl. 137) all forms of conspiracy and confederacy were put by the commission of the peace into the jurisdiction of the justices; but this cannot be read as widening the definition of the offence (see 2 Co. Inst. 383, 562).

It is to be noted that the appearance of those parliamentary entries points to the novelty of the crime, and the absence of any adequate remedy at common law. This is consistent with the evidence of early writers on law. Bracton (*de Actionibus*, lib. iii. c. 5, f. 105) says: "Facta puniuntur ut furta, homicidia; scripta, ut falsa et libelli famosi: consilia ut conjurationes," and (*de Corona*, lib. iv. c. 12. 20. 13) in speaking of accessories, "because where a principal has no existence things consequent on it have no place, as may be said of precept conspiracy and the like, because these things may occur without any act, and are sometimes punished if an act follows on them, but without any act not so, as is said: "quid enim obfuit conatus cum injuria nullum effectum. Nec etiam obesse præceptum, conspiratio, præceptum et consilium, nisi factum subsequatur?"

The *Mirror of Justices* (apparently written about 1290, see 7 Seld. Soc. Pub. xxv.) merely speaks generally of all manner of conspirators as to be included in presentments on view of frankpledge. The latter statement is without authority, and that of Bracton, so far as it goes, indicates that in his day conspiracy was only regarded as an aggravation of a crime, and that until some public or private wrong had been caused by some act there was no punishment. And this doctrine appears to have been maintained till 1611, when it was ousted, by the application of more bad reasons in Latin: "quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud: et affectus punitur, licet non sequatur effectus." This epigram in the form of a Baconian apophthegm is made to do duty for an argument; and the Court, indeed, strained for purposes of repressive justice the saying "qui veut le fin veut les moyens"; though criminal justice is properly concerned with acts coupled with intention, and not with mere volitions, whose appropriate censure, if any, belongs to religion or morals and not to law. But it is curious that the extension of the offence of conspiracy into its present form began in 1611 in that Court of criminal equity, the Star Chamber, and that the King's Bench claimed in 1616 and ultimately absorbed its jurisdiction, and set itself up as *custos morum patriæ*. Up to this time, speaking generally, and apart from the Statutes of Labourers, the only conspiracies known to the law or commonly treated as crimes were conspiracies to pervert, obstruct, or defeat the course of justice, or by officials to defeat or delay justice or to extort under colour of office.

Mr. Justice Wright (on *Conspiracies*, p. 6) conclusively shows that it was not until the *Poulterer's* case, 1611, 9 Co. Rep. 55 Cam. Stell., that it was established that the agreement for a conspiracy within 33 Edw. I. was indictable as a substantive offence, even when nothing had been done to execute it. The stages of development were—

- (a) A conspiracy to accuse falsely of felony, for which no legal remedy was available until after acquittal;
- (b) A conspiracy to accuse, etc., for which a criminal remedy was available, even if a grand jury ignored the bill (*Sydenham v. Keilaway*, 1574, Cro. (2) 8);
- (c) A conspiracy to accuse, etc., which stopped short of sending up the bill, for which a criminal remedy was held available (*The Poulterer's* case, 1611, 9 Co. Rep. 55).

When the ordinances against conspirators were promulgated, perjury was rather a matter of ecclesiastical cognisance than for punishment by the king's Courts. Persons who brought unfounded actions or false appeals were amerced *pro falso clamore* for the benefit of the Crown; but indictments for perjury were rarely if ever used before the sixteenth century. They rendered proceedings for conspiracy unnecessary where false evidence was actually given, as the perjurer and the suborner of perjury could be dealt with, without resort to the ordinance of conspirators.

The Courts next took cognisance of conspiracies to accuse of crime, whether for malice or extortion, even where the conspirators neither intended nor attempted to take legal proceedings in support of the accusation (*R. v. Spragge*, 1760, 2 Burr. 996, 1027; *Macdaniel's* case, 1755, Fost. Cr. Law, 121; 10 St. Tri. 417); but the gist of this and any other consultation or agreement to accuse of crime, or of a false fact, has always been that it was not to further justice nor to support a charge honestly, and, on reasonable grounds, believed to be true, but to utilise a false charge from motives of malice or revenge or pecuniary greed (*R. v. Best*, 1705, 2 Raym. (Ld.) 1167; *R. v. Kinnersley*, 1719, 1 Stra. 193). This head of conspiracy has been further extended to a combination by justices to certify falsely that a highway was in repair, in order to influence the Court of King's Bench (*R. v. Mawbey*, 1796, 6 T. R. 619; 3 R. R. 282), and generally to all combinations to obstruct justice, whether by suborning or trepanning witnesses, or enabling offenders to escape (see Wright on *Conspiracies*, pp. 30, 31), or by compounding a felony (see THEFT BOTE), or apparently by compounding or stifling a misdemeanour in respect of which a prosecution has been commenced.

A combination to enforce by legal process a pretended debt is a conspiracy within the words of the ordinance of Edw. I., but as late as 1883 was solemnly discussed and even made subject of an appeal, without any reference *arguendo* to the ordinance (*R. v. Taylor*, 1883, 15 Cox, C. C. 265, 268).

A conspiracy to charge a man as the reputed father of a bastard (Hawk., P. C., bk. i. c. 72, s. 2) seems to fall within 33 Edw. I., as it involves legal proceedings of a quasi-criminal character to establish his liability to maintain the child, or to libel the alleged parent.

The decision in the *Poullterer's* case, 1611, 9 Co. Rep. 55, while it enabled the Courts to strike at a combination, which, if executed, would certainly be criminal before the criminal purpose had advanced beyond agreement (see *R. v. Kinnersley*, 1719, 1 Stra. 193), fell very far short of defining conspiracy as it is now understood.

The next step in development was the proposition that "all confederates whatsoever wrongfully to prejudice a third person are highly criminal" (Hawk., P. C., bk. i. c. 72, s. 2). This goes beyond the particular manner and means specified in the ordinances, and leaves the lawyer to ascertain whether "wrongfully" refers to crime, tort, or breach of contract, and appears to have been the product of the post-Restoration judges prior to Lord Holt.

Conspiracy to commit a Crime.—The eighteenth century decisions in the main are confined to cases of conspiracy to commit what would be an offence if done by an individual, which was determined in the seventeenth century to be a criminal offence (Wright on *Conspiracy*, p. 26).

It is now firmly established that an agreement to commit any offence is an indictable conspiracy, whether the principal offence is punishable on indictment or summarily, and even it would seem when it is a mere breach of a by-law or petty police regulation (*R. v. Pollman*, 1809, 2 Camp. 229; 11 R. R. 698; *R. v. Whitchurch*, 1890, 24 Q. B. D. 420).

Conspiracy to commit treason was at first not more than a misdemeanour, but was soon merged in the principal offence by application of the rules as to overt acts, and that there are no accessories in treason (*Fost. Cr. Law*, 195, 197; *R. v. Hensey*, 1758, 1 Burr. 642; *R. v. de la Motte*, 1781, 21 St. Tri. 687; *R. v. Stone*, 1796, 6 T. R. 527; 3 R. R. 253), and it was made punishable as a felony at the election of the Crown by the Treason Felony Act, 1848 (11 & 12 Vict. c. 12, s. 7; *Mulcahy v. R.*, 1868, L. R. 3 H. L. 306); and see TREASON.

Conspiracy to murder is a statutory misdemeanour (24 & 25 Vict. c. 100, s. 4), punishable by penal servitude from three to ten years, or imprisonment with or without hard labour for not over two years (54 & 55 Vict. c. 69, s. 1). The offence is committed whether the intended victim is or is not a British subject, and whether he is or is not within the Queen's dominions. This addition was made in the Act of 1861, because of the doubts and difficulties as to the law raised by *R. v. Bernard* (1858, 1 F. & F. 240; Russ. on *Crimes*, 6th ed., vol. i. p. 511).

Seditious conspiracy is a combination for political objects, to assemble unlawfully, or commit sedition, *i.e.* to resort to attempts falling short of treason, by violent language or show of force, or to traduce and vilify the government or the legislators, and excite disaffection, or to effect any public object of an evil character, *i.e.* inconsistent with the public peace, and the good government of the country, or the political opinion of the judge or jury (2 Stephen, *Hist. Crim. Law*, 380, 381). The first prosecution for this offence was in 1795 (*R. v. Redhead Yorke*, 25 St. Tri. 1003). Prosecutions were common in this country up till 1850, and in Ireland up to a much later date (see *R. v. Hunt*, 1820, 1 St. Tri. N. S. 171; *R. v. O'Connell*, 1843, 5 St. Tri. N. S. 1). The overt acts usually charged or put in evidence to establish the offence are meetings to hear seditious and inflammatory speeches (see SEDITION). This branch of conspiracy is to some extent regulated by statute.

The Unlawful Oaths Act, 1797 (37 Geo. III. c. 123) makes it felony (s. 1) "to administer, or cause to be administered, or aid or assist, or be present at, and consenting to, the administering or taking any oath or engagement purporting or intended to bind the person taking the same, to be of any association, society, or confederacy formed for any mutinous or seditious purpose, or to disturb the public peace . . . or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy." This Act supplements the law of treason, misprision of treason, and conspiracy to commit treason (s. 7). The Corresponding Societies Act, 1799 (39 Geo. III. c. 79), prohibits a large number of societies and confederacies as unlawful combinations.

Mr. Justice Wright (on *Conspiracies*, p. 28) examines separately the cases of combination against government. Most of these combinations are really agreements to commit a public offence, such as treason, sedition, peculation, or fraud on the revenue. Combinations not to pay taxes were treated in 1340 (1 Rot. Parl. 1176) as conspiracies; but the leading revenue case is *R. v. Starling*, 1665, Sid. 174, on a combination to depauperate the farmers of the Crown revenue of excise, though the acts done would apparently have been criminal apart from conspiracy, under the wide jurisdiction of the Court of Exchequer for the protection of the public revenue.

Combinations against public morals or decency in one sense fall within the class of conspiracies to commit crime, inasmuch as the acts, if not offences under the common or statute law in respect to which conspiracy has been charged, are in most if not all cases punishable in the ecclesiastical Courts, *e.g.* fornication or adultery, which also involves what is always termed un-

lawful carnal intercourse (*R. v. Lord Grey*, 1682, 9 St. Tri. 127; *R. v. Delaval*, 1763, 3 Burr. 1434; *R. v. Mears*, 1851, 2 Den. C. C. 79; *R. v. Howell*, 1864, 4 F. & F. 160). The Criminal Law Amendment Act, 1885, punishes the commission by individuals of a number of acts previously punishable only as conspiracies.

Conspiracies to Cheat and Defraud.—The law was for a long time uncertain as to what cheats were indictable, and what subject to civil remedies only (see CHEAT). While the uncertainty existed the judges extended the law of conspiracy to combinations to cheat and defraud by means of any false representation, whether it amounted to an indictable cheat or only to a deceit or fraud for which an action at law or a suit in equity could be brought (*R. v. Warburton*, 1870, L. R. 1 C. C. R. 274). This form of conspiracy is that most commonly prosecuted, inasmuch as it enables the law to reach cases where the statute law as to false pretences does not apply, and where the object of the agreement is utterly fraudulent, but the proposed deceit from one cause or another fails or is abandoned.

Where the fraud is to be effected by legal proceedings the offence is within 33 Edw. 1; where it is extrajudicial it is in many cases a conspiracy to commit crime, but in some a conspiracy to commit a mere civil wrong. For particular instances of proceedings for these conspiracies, see Archbold, *Cr. Pl.*, 21st ed., 1100. Those of most practical importance are *R. v. Kenrick*, 1843, 5 Q. B. 49, a conspiracy to get money by a contract to be obtained by false pretences; *R. v. Orman*, 1880, 14 Cox, C. C. 371, a conspiracy to get goods on credit not meaning to pay for them; *R. v. Aspinall*, 1876, 1 Q. B. D. 730, a conspiracy by company promoters to cheat those of the public who could be attracted by their advertisements; *R. v. de Berenger*, 1814, 3 M. & S. 67; 15 R. R. 415, a conspiracy to affect the price of stocks by false rumours.

Combinations to Injure Individuals otherwise than by Fraud.—The widest extension of the definition of conspiracy is that which includes within its scope combinations which are not treasonable or seditious, and contain no element of fraud, but involve violation of the private rights of individuals in a manner which, if done by a single person, would give a civil though not a criminal remedy against the perpetrator.

These conspiracies have been made punishable by the construction put on the word "wrongful" in Hawkins' definition (*ante*, p. 294), by extending it from criminal acts to acts amounting to a merely civil injury. In the opinion of Mr. Justice Wright the inception of this development lies on the misunderstanding of *R. v. Starling* (*ante*, p. 295); and the acceptance of the opinion of Hawkins, without adequately testing the data upon which it was founded, and his analysis of the decision, goes strongly to show that as a general rule, a combination to injure a private person is not criminal unless the means to be used are criminal, *i.e.* that this form of conspiracy is really only a conspiracy to commit a crime (Wright on *Conspiracy*, 37-43). This explanation, while in accord with modern criticism of the law, cannot receive judicial acceptance without overruling a good many decisions, which are only justifiable on the assumption that the agreements to use unlawful as distinct from criminal means are punishable, though such a definition of crime practically makes all joint tortfeasors criminally liable. And it is undoubtedly in conflict with the view of Sir William Erle in *R. v. Rowlands*, 1851, 17 Q. B. 671, expressed again before the Commission of 1867, that a deliberate combination to injure a man in his civil rights is criminal; and with the case of *Lumley v. Gye*, 1853, 22 L. J. Q. B. 471, now under review in the House of Lords in *Allen v. Flood*.

Conspiracies in Restraint of Trade and Freedom of Contract.—The main contest, partly forensic, partly political, has raged round the question of conspiracy in furtherance of trade disputes, and the schemes of the agrarian and political agitators in Ireland (*R. v. Parnell*, 1881, 14 Cox, C. C. 508). The controversy which has long raged and still rages on this subject arose first out of "the mediæval doctrines as to regulation of wages and confederacies of workmen accepted by legislators until the beginning of the present century" (Pike, *Hist. Crim.* ii. 436).

There is strong reason for believing that agreements in restraint of trade were in the Middle Ages regarded not merely as unlawful in the sense of being unenforceable (see *Mogul* case, [1892] App. Cas. 28), but as criminal, quite independently of combination (see 3 Stephen, *Hist. Crim. Law*, 199–201; Wright on *Conspiracies*, 43). But such combinations were not conspiracies within the *ordinatio de Conspiratoribus*, nor is there any trace of their having been regarded as offences at common law.

Combinations or conspiracies artificially to raise or depress prices, apart from the use of fraud or falsehood, were certainly dealt with as criminal offences, quite apart from considerations of the public revenue; but so long as forestalling, engrossing, and regrating were crimes, the conspiracy was a mere matter of aggravation rather than an independent offence, or if regarded as an offence was in the nature of an attempt to do what would be a crime if done by one person. Since the abolition of the principal offences (7 & 8 Vict. c. 24, ss. 1, 2) such combinations are now indictable only (1) where the facts bring this within the category of conspiracies to cheat or defraud (*R. v. de Berenger*, 1814, 3 M. & S. 67; 15 R. R. 415; *R. v. Aspinall*, 1876, 1 Q. B. D. 730; 2 Q. B. D. 48; *Scott v. Brown*, [1892] 2 Q. B. 724); (2) where the conspiracy is to spread a false rumour with intent to enhance or deery the price of goods, or to prevent or endeavour to prevent by force or threats the bringing of goods to fair or market. This view of the law seems to be established by the opinions of the Law Lords in the *Mogul* case, [1892] App. Cas. 25; see also S. C. per Lord Coleridge, C.J., 21 Q. B. D. at pp. 549, 550.

The notion of the criminality of agreements in restraint of trade has during this century receded from the English Courts almost *pari passu* with the growth of the economical doctrines as to the freedom of trade; *i.e.* trade may be fettered by combinations of employers or workmen, or by syndicates or trusts, but not by revenue regulations or protective enactments (see *Nordenfelt v. Maxim-Nordenfelt Co.*, [1894] App. Cas. 535).

Sir James Stephen (3 *Hist. Crim. Law*, 226) seems to be right in saying that the common law in no way interfered with the right of masters or free labourers to combine for their own trade interests. Indeed, the mediæval trade guilds are standing instances of such combinations. The series of Acts (beginning with 23 Edw. III. in 1349, and going up to the Statute of Labourers, 2 & 3 Edw. VI. c. 15) against combinations by workmen to raise wages, appear to have been passed in the view that the common law did not punish such combinations; and even until the end of the seventeenth century indictments for this form of conspiracy are framed *contra formam statutorum*; *i.e.* the criminality of the combination was understood to be derived from the statutes, and not from the now established notion that conspiracy was a common law offence. Similar legislation restricting the freedom of labourers to demand a rise in wages and prohibiting combinations (irrespective of any question of riot, unlawful assembly, or sedition) was frequent from the time of Elizabeth until the end of the eighteenth century (3 Stephen, *Hist. Crim. Law*, 205, 206), when a general Act (40 Geo. III. c. 60)

forbade any combination by any workmen for the purpose of raising wages. Such legislation requires justification to modern notions of freedom of contract and trade; but the legislator of last century may find his excuse in Benjamin Franklin's description (*Memoirs*, iii. 315, May 14, 1768) of the effect of trade disputes on London: "... Even this capital (London) is now a daily scene of lawless riot. Mobs patrolling the streets at noonday, some knocking all down that will not roar for Wilkes and liberty. Courts of justice afraid to give judgment against him. Coalheavers and porters pulling down the houses of coal merchants that refuse to give them more wages; sawyers destroying sawmills; sailors unrigging outward bound ships (see 33 Geo. III. c. 67), and suffering none to sail till merchants agree to raise their pay; watermen destroying private boats and threatening bridges."

The Act of 1800 was repealed in 1824 (by 5 Geo. IV. c. 95). Prior to 1825 there is no decision, except, perhaps, the *Journeymen Tailors of Cambridge*, 1721, 8 Mod. Ca. 10, which appears to treat a combination to raise wages as a common law offence (3 Stephen, *Hist. Crim. Law*, 209), and only a few dicta to the effect that such a combination can be described as unlawful (see *R. v. Mawbey*, 1796, 6 T. R. 619; 3 R. R. 282).

The opinion of Sir W. Erle and those of Sir J. Stephen and Mr. Justice Wright are, however, in conflict on this historical question. The Act of 1825, Geo. IV. c. 129, which superseded that of 1824, deals in terms only with assaults, intimidation, etc., for interference with the freedom of employers or workmen, and left conspiracies to commit any of the acts prohibited to be dealt with as conspiracies at common law to commit a crime (3 Stephen, *Hist. Crim. Law*, 217). There are two conflicting views of the effect of this statute—one that all combinations to raise wages were criminal at common law, and that the statute created certain exceptions; the other, that such combinations were only criminal by statute, and that the Act of 1825 got rid of the old statutes and formed a new code on the subject (3 Stephen, *Hist. Crim. Law*, 226). Concurrently with this conception the opinion prevailed that conspiracies in restraint of trade were offences at common law, apart from the enactments referred to. The opinion is thus summed up (3 Stephen, *Hist. Crim. Law*, 218): (1) that all combinations of workmen to raise wages were illegal, with the limited exceptions introduced by the Act of 1825; (2) that all combinations to injure or obstruct an employer in his business, whether by his own workmen or outsiders, is a criminal conspiracy; (3) that agreements in restraint of trade are certainly so far unlawful as to be void, but it is uncertain whether they are criminal conspiracies (*Hilton v. Eckersley*, 1856, 6 El. & Bl. 47; *Mogul* case, [1892] App. Cas. 25). Bramwell, B., in *R. v. Drutt*, 1867, 10 Cox, C. C. 600, went a step yet further in his summing up, and laid it down that an agreement for co-operation against liberty of mind and freedom of will, irrespective of any intimidation or physical coercion, is a criminal conspiracy. This ruling, and a decision that trade unions were so far illegal, that their funds were not protected under the Friendly Societies Acts of 1855 (*Farrer v. Close*, 1869, L. R. 4 Q. B. 602), led to the appointment of a Commission in 1867, which reported in 1869 (Parl. Pap. 1869), on the law of conspiracy as it affected combinations of employers or employees for trade purposes, and, in consequence of the report, was passed the Criminal Law Amendment Act, 1871 (38 & 39 Vict. c. 32), which repealed the Act of 1825, and limited conspiracies in restraint of trade to conspiracies to do things prohibited by the Act. But even under this Act, in the *Gas Stokers'* case of 1872, it was held

that a combination to strike suddenly was indictable as a conspiracy to molest in business (3 Stephen, *Hist. Crim. Law*, 225). Consequently, in 1875, the law was again amended, and the rights of trade unions are now regulated by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), under which "an agreement or combination by two or more persons to do or to procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable, as a conspiracy, if such act, if committed by one person, would not be punishable as a crime." The Act does not apply as between rival employers or traders; but in the first reported decision on that Act (*R. v. Bauld*, 1876, 13 Cox, C. C. 282), Huddleston, B., affirmed that neither masters nor men had a right to take any proceedings to require or compel other masters or men to adopt their views on any trade question. See *BESSET*.

Procedure and Evidence.—Conspiracy is triable at Quarter Sessions when the offence for the commission whereof the conspiracy is formed can be tried there (5 & 6 Vict. c. 38, s. 1; *R. v. Latham*, 1864, 33 L. J. M. C. 197). It is within the Vexatious Indictments Act, 1859, and its amendments (22 & 23 Vict. c. 19; 30 & 31 Vict. c. 35). The proper place of trial is the county in which it was formed, or in which any of the alleged conspirators did any act in furtherance of the common design (*R. v. Brisac*, 1803, 4 East, 164; 7 R. R. 551). The indictment may be in perfectly general terms without setting out the overt acts or particulars of the conspiracy, but the Court can order particulars to be delivered if desired (*Fost. Cr. Law*, 194; *Arch. Cr. Pl.*, 21st ed., 1103).

The expression "overt act" is most commonly used with reference to the offences of treason and conspiracy. Innumerable cases determine a series of doings or plottings which have been regarded as an overt act (*Arch. Cr. Pl.*, 21st ed., 836, 837), but no judicial attempt seems to have been made to define its exact nature. It seems to correspond somewhat to the French law term *voie de fait* (*per viam facti*), and to have been originally used in contradistinction to what in theology or casuistry or scholastic philosophy was termed a mental act, or volition or intention not communicated to the mind or senses of another. From this point of view the agreement which is the *sine qua non* of conspiracy is the inter-communication of intentions, and that assent of each conspirator to the wish, or intent and plan of the other which constitutes a common purpose, and which cannot be formed without some external manifestation of the intent or purpose of each conspirator. But "it is not necessary that all the conspirators should be in (direct) communication with each other, or even that they should know of each other's existence. But they must all be acting in furtherance of a common object, and in accordance with some concerted plan" (*Mayne, Crim. Law of India*, 1896, p. 434).

When the existence of a conspiracy is proved, the acts, writings, and words of one conspirator in reference to the common purpose are admissible as evidence against the others, whether they were or were not proved to be present when the act, word, or writing took place (*R. v. Lord Preston*, 1691, 12 St. Tri. 645; *R. v. Stone*, 1796, 6 T. R. 527; 3 R. R. 253; *R. v. Hunt*, 1820, 1 St. Tri. N. S. 171). Technically, this rule presupposes, as a condition precedent to its applicability, complete proof of the conspiracy; which in practice would lead to a deadlock. But the difficulty is got over by receiving that which is evidence against one provisionally, and leaving it to the judge at the close of the evidence to rule how much of the evidence adduced may be considered by the jury with reference to each conspirator. This, if the evidence is elaborate, is a most difficult task,

for the acumen of the judge, and the sifting and classification of the evidence to be considered as to each man, is calculated to obfuscate the jury, if not to give rein to impressions and prejudices.

Where two persons are indicted for conspiracy together, and they are tried together, both must be acquitted or both convicted (*R. v. Manning*, 1883, 12 Q. B. D. 241). But an indictment is good which charges a conspiracy between A. and a person or persons to the jurors unknown, or a named person who is dead or not amenable to justice, and a conviction of the single person in custody would be valid.

Persons jointly charged with conspiring together may be tried separately if the Court thinks fit. The rule as to the unity of husband and wife, coupled with the presumption that a wife is under the control of her husband, has led to the decision that husband and wife cannot be indicted for conspiring together (*Hawk.*, P. C., bk. i. c. 72, s. 8).

Punishment.—Where a conspiracy is made a felony by statute, its punishment is regulated by the statute (see 11 & 12 Vict. c. 12).

The villainous judgment (*ante*, p. 292) is obsolete, and conspiracy as a misdemeanour is punishable at common law by imprisonment without hard labour at the discretion of the Court and (or) fine and (or) sureties to keep the peace and be of good behaviour. Hard labour may be imposed where the conspiracy is to cheat or defraud, to extort money or goods, falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice (14 & 15 Vict. c. 100, s. 29; and see 38 & 39 Vict. c. 86, s. 3).

Civil Proceedings.—The first civil remedy given for conspiracy was by writ of conspiracy out of the King's Chancery, of which there is no trace before 1290. The ordinance of 1292 (1 Rot. Parl. 96) appears to provide for the issue of writs by the chief justice of the King's Bench or the grants of inquests in eyre. The *Articuli super Chartas* of 1300 (28 Edw. I. c. 10) refers to the writs out of Chancery, and allows the grant of inquests on the eyre without writ. And an entry of 1305 (Y. B. 33 Edw. I., ed. Pike, p. 463) states that writs out of Chancery for falsely procuring an indictment were then forbidden; but that trial of a writ granted before the veto was allowed (see 2 Co. Inst. 562). But by 1315 the issue of the writ out of Chancery seems to have revived (1 Rot. Parl. 320). Whatever the mode of their institution, civil suits for conspiracy were allowed; they seem always to have been framed on the ordinances (Fitzh. N. B. 114 D.), but they corresponded closely to actions on the case for malicious prosecution (see *Hawk.*, P. C., bk. i. c. 72, s. 2, and *Archbishop of York's case*, 1330, 2 Rot. Parl. 31), or in some cases to an action of deceit or covin to defraud of lands (1315, 1 Rot. Parl. 320); but the writ was not granted at first, unless the applicant could show that the legal proceeding as to which he alleged conspiracy had ended in his acquittal, nor for a mere combination to put in false documents. And these suits were totally different from the suits which are now occasionally brought for a conspiracy, which usually do not more than allege an ordinary tort committed by joint tortfeasors under aggravating circumstances, though occasionally they are attempts to extend the limits of civil responsibility as wide as the sweep of the net of the criminal law of conspiracy. See COMBINATIONS.

Whether under the old law or its new developments, the action will not lie for the conspiracy unless it be put in execution; for in a civil case the damage, and not the combination, is the gist of the action (Burn, *Justice*, 17th ed., 421; Clerk and Lindsell on *Torts*, 2nd ed., 24). Some of the old books speak of fine and imprisonment for damages in conspiracy at the suit of the party (*Hawk.*, P. C., bk. i. c. 72, s. 9). If this be accurate, it

is an isolated instance of the combination in one proceeding of the Crown prosecution and suit by the *partie civile*, and it is not justified by the terms of the ordinances already cited, nor the old commissions (e.g. that of 1331, 2 Rot. Parl. 60) issued to inquire, hear, and determine "as well at the suit of the Crown as that of the party," all conspiracies, etc. The civil remedy was in damages from the earliest time (1315, 1 Rot. Parl. 320).

[*Authorities.*—Wright on *Criminal Conspiracies*; 3 Co. Inst. 174; Hawk., P. C., bk. i. c. 72; Russ. on *Crimes*, 6th ed., vol. i. pp. 492–552.]

Constable.—This term is derived from a court office of the Byzantine Empire, *Comes stabuli* (Fr. *Connétable*), which in meaning was originally almost equivalent to marshal. The term was adopted by the Frank kings as the title of the chief officer of the household, who ultimately as *Connétable de France* became commander-in-chief (see Murray, *Dictionary English Language*, s.v.). It was imported into England at the Conquest, and has been applied to many officials of very different degrees of dignity.

1. The constable of England or Lord High Constable held the same position as the constable of France until *temp.* Henry VIII., when the office ceased to be regularly filled. Appointment is now made only temporarily for great occasions, such as coronations. As to the duties, see CONSTABLE AND MARSHAL.

2. Royal castles and forts were committed to the custody of constables. Such offices were, in some instances, hereditary under royal grant and without fee (but see 19 Hen. VII. c. 10, s. 3); in others, like the office of Constable of the Tower and Windsor and Dover Castles, are given as an honourable retirement to high military or political officers. It is in this sense that the term is used in Magna Carta (25 Edw. I. c. 20) and in Stat. West. 1 (3 Edw. I. c. 7), and it appears in no other sense in Bracton (*de Essoniis*, f. 337).

3. High constables of hundreds seem to have been created by the Statute of Winchester (1285, 13 Edw. I. st. 2, c. 6). There are still unrepealed certain statutory provisions in the Police Rates Act, 1844 (7 & 8 Vict. c. 33, s. 8), as modified by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72, s. 121), for the appointment of high constables for hundreds at special sessions held to hear rating appeals, and as to the declaration of office to be taken. But by the High Constables Act, 1869 (32 & 33 Vict. c. 47), provision is made for discontinuing the common law office of high constable of any county or riding, etc., or hundred, and for transferring his power and duties to the chief constable appointed under the Police Acts, except as to the services of notices, which are now effected by the clerks of petty sessional divisions (see POLICE). The Act, however, makes an exception as to high constables who are by law or custom returning officers at any parliamentary or municipal election, or are charged with the supervision of the electoral register, or in whom any real property is vested. In consequence of these enactments the provisions of 41 Geo. III. c. 78, s. 2, as to recouping a high constable his expenses in case of riot and felony, and as to notice to the high constable of claims on the hundred, are now applicable to the chief constables of county or borough police, and not to the common law official. The origin of the office of petty constable is also traced to the Statute of Winchester (1 Black. Com. 355), and the office is distinct from though confused with those of *headborough* and *tithingman* and *chief pledge* (q.v.).

4. The duties of the petty constable by custom or statute are fully detailed

in *Lambarde, Eirenarcha*; Dalton, *Country Justice*; Bacon, *Abr. Constable*; Burn, *Justice*, 30th ed.; Hawk., P. C., bk. ii. c. 10; but have now in the main passed over, at least as to criminal matters, to the county and borough police, the officers of which force have acquired all the powers and duties of parish constables (see 2 & 3 Vict. c. 93, s. 8). The power to appoint parish constables and the duties of the office still survive for certain purposes under statutory regulation. The Parish Constables Act, 1842 (5 & 6 Vict. c. 109), put an end to the selection of constables, by courts leet, or the sheriffs tourn (s. 21), and directs the issue by justices for every petty sessional division during the first seven days of February in each year of a precept to the overseers to make out lists of the persons in their parishes qualified to be constables, *i.e.* every able-bodied man between twenty-five and fifty-five, with certain exemptions, including post office employees (13 & 14 Vict. c. 20, s. 5), and certain disqualifications, *e.g.* of licensed victuallers, game-keepers, and persons attainted of treason, felony, or infamous crime (5 & 6 Vict. c. 44, s. 7). The overseers must make out and publish the lists and attend a special sessions at which the justices choose the constables to serve for the ensuing year, and publish the list of persons chosen. Vacancies occurring during the year can be filled (s. 16). The County Quarter Sessions, subject to the approval of the Home Secretary, can settle tables of fees and allowances for serving summonses and executing warrants, or any written order of justices performing occasional duties, subject in each case to allowance by order of a petty sessional Court (5 & 6 Vict. c. 44, s. 17; 13 & 14 Vict. c. 20, s. 2; 35 & 36 Vict. c. 92, s. 9). Since the Parish Constables Act, 1872 (35 & 36 Vict. c. 92), unpaid parish constables cannot be appointed in any parish unless a resolution of Quarter Sessions is in force sanctioning the appointment; but the vestry of a parish not in a borough (*i.e.* a London vestry, or a parish council or parish meeting) can still appoint paid parish constables (s. 4). The constables appointed under the Act of 1872 are subject to the control of the chief constable of the district, and have all the duties, powers, protections, and immunities belonging to the office of parish constable, and the power but not the duty of executing a summons or warrant outside the parish of which he is constable. But in practice their functions are confined to the receipt of notices as to disorderly houses (see BROTHEL; DISORDERLY HOUSE), and service of notices, etc., with respect to licensing business (see INTOXICATING LIQUORS), or business as to nuisances, and they do not interfere with the work of county or borough police.

Constable and Marshal.—The Court of the Constable and Marshal, *i.e.* the Lord High Constable and Earl Marshal of England, or the Court of Chivalry, may be held before these two high officers of the Court for the determination of matters relating to the law of arms. The Court is obsolete, but has not been formally abolished. It was not a Court of the common law, but had both civil and criminal jurisdiction.

1. Civilly, it sat as a Court of Honour, a jurisdiction now exercised by the Earl Marshal so far as it refers to coat armour. Its civil jurisdiction was limited in 1389 (13 Rich. II. st. 1, c. 2) to contracts touching deeds of arms without the realm, and matters relating to arms within the realm, which were not cognisable by the common law.

2. In criminal matters its jurisdiction extended to treason, murder, and other crimes committed by Englishmen abroad. Its attempts to encroach on the criminal jurisdiction of the common law Courts were restrained in

1399 (1 Hen. IV. c. 14). In time of war it acted as a standing court-martial, and punished military offences in accordance with the articles of war and the civil law, without regard to the common law. With the extinction of the office of high constable as a standing office the Court ceased to be effective, and it has not sat since 1631, when it was convoked to try an appeal of treason abroad by wager of battle. See BATTLE (TRIAL BY). Its functions as a court-martial have been rendered unnecessary by the provisions of the Mutiny Acts, and the Army Act and Regulations. See MARTIAL LAW.

[*Authorities.*—1 Stubbs, *Const. Hist.* 354; *Official Manual of Military Law*, c. 2; Neilson, *Trial by COMBAT*.]

Constablewick.—The area for which a constable is appointed to act. See CONSTABLE.

Constitutional Law.—Constitutional law is described in the INTRODUCTION (*q.v.*) as a branch of public law containing so much of the political constitution as is laid down in positive legal rules, and as including such subjects as the formation, powers, and privileges of Parliament, the executive functions and powers of the Crown, the existence and composition of the judicial establishment, the legal position of the clergy, the army, the navy, and the various departments of the public service in relation to the Crown and Parliament, and the machinery of local government. These subjects are treated under separate heads. Here, however, it may be observed of English constitutional law in general, that it is an integral part of the common and statute law of the realm, and has come into existence and may be altered, in the same manner as any other part of English law. We have no written constitution purporting to define the distribution of public powers in the State, though such parts of our constitutional law as have been embodied in statutes belong to the category of written law. We have no special methods, provided by way of safeguard, of modifying constitutional laws, such as are to be found in the United States with regard to the amendment of the constitution. Lastly, our constitutional law is in large measure merely an application of ordinary common law principles. We have no special tribunals for the trial of political and administrative matters, no special body of law protecting public servants from the ordinary legal consequences of exceeding their authority, no power in the executive to suspend the safeguards of law by proclaiming martial law or a state of siege in times of disturbance.

But while the English constitution is based on the supremacy of law, it is only in part made up of the legal rules of common and statute law. Such legal rules settled piecemeal, as questions from time to time arose, do not of themselves provide a working constitution. Since the Revolution a large body of customary or conventional rules have come into existence; and such rules, though forming no part of our law, and neither recognised nor enforceable by our Courts, are yet observed with scarcely less regularity than the law itself. The most important of these rules relate to the Cabinet system (see CABINET), by which the executive powers vested in the Crown by law are brought under the control of the House of Commons, and ultimately of the constituencies. Thus the law of the constitution gives the Crown the choice of its ministers, custom prescribes that they should be acceptable to the House of Commons. Such customary rules do not conflict

with legal rules, but further limit the way in which legal powers may be exercised. Blackstone's failure to take account of the customary part of the constitution is the reason why his picture of the constitution, though legally accurate, is so completely misleading. Bagehot was the first writer to do justice to the customary part of the constitution. Professor Dicey in his work on the *Law of the Constitution* has analysed the relation of these conventional or customary rules to the law of the constitution, and shown that indirectly they have a legal sanction, because any persistent failure to observe such of them as are fully established would sooner or later lead to an actual breach of the law. In other words, such rules are the result of experience, and mark the only way in which our constitutional system can be made to work. It should be observed that even a written constitution purporting to provide a complete scheme of government, such as that of the United States, is also liable to be controlled in its working by the growth of a body of customary rules. Thus the election of the American President has been transferred from the College of Presidential Electors to the people at large by the growth of the customary rule that each of the presidential electors should abdicate his functions of choice and pledge himself before election to vote for a particular candidate.

Constitutions of Clarendon.—In the reign of Henry II. a controversy of the greatest importance arose between the king and the clergy under Becket, the Archbishop of Canterbury, as to questions of ecclesiastical jurisdiction and the amenability of the clergy to the civil Courts. In consequence of this dispute, and with a view to its determination, Henry II. summoned a council, composed of the bishops, barons, and other nobility of the kingdom, which met at Clarendon, in Wiltshire, in 1164 (see *Radulfi de Diceto*, vol. i. p. 312, Rolls' ed.; Gervase, vol. i. p. 178, Rolls' ed.; Lyttelton, *Life of Henry II.*, vol. ii. p. 354), and directed that the customs and usages regulating the jurisdiction of the ecclesiastical Courts, and the rights of the clergy in the time of Henry I., should be ascertained by recognition, and reduced to writing. The record embodying the results of the recognition presented in pursuance of this order is known as the Constitutions of Clarendon.

The Constitutions of Clarendon were designed to re-enact the law as it stood in the reign of Henry I., and they form a codification of the usage with regard to the matters in dispute. As judged by the standard which had crept in during the anarchy, they were undoubtedly innovations, but as judged by the standard of earlier times, there is little in them but the ancient customs of the realm put forth in the systematic shape of regular enactments (see Freeman, *Norman Conquest*, vol. v. p. 675). They are sixteen in number, and are concerned with questions of advowson and presentation, churches in the king's gift, the trial of clerks, the security to be taken of the excommunicated, the trials of laymen for spiritual offences, the excommunication of tenants-in-chief, the licence of the clergy to go abroad, ecclesiastical appeals which are not to go further than the archbishop without the consent of the king, questions of the title to ecclesiastical estates, the baronial duties of the prelates, the election to bishoprics and abbacies, the right of the king to the goods of felons deposited under the protection of the Church and the ordination of villeins (Stubbs, *Const. Hist. Eng.*, vol. i. pp. 464, 465).

The original Latin text of the Constitutions of Clarendon will be found in the authorities mentioned below, but the effect of the chief provisions

may be thus summarised: Disputes as to advowsons and presentations are to be tried and determined in the king's Court (cap. i.). Churches in the king's fee are not to be granted in perpetuity without his consent (cap. ii.). Ecclesiastics accused are to appear in the king's Court to answer charges there cognisable, unless the matter is by the king's justiciary relegated to the ecclesiastical Court as being there cognisable. The temporal Court is to judge by which jurisdiction accused clerks are in each case to be tried, and is to watch the proceedings of the ecclesiastical Court; and if the clerk be convicted or confess his crime, the Church is not to afford him protection (cap. iii.; on the construction of this clause, see Pollock and Maitland, *Hist. Eng. Law*, vol. i. p. 431; Freeman, *Norman Conquest*, vol. v. p. 676). The leading clergy are not to leave the realm without licence from the king, and if they leave, he may require them to give security against acting prejudicially (cap. iv.). If laymen are so powerful that no one will, or dare, accuse them, the sheriff, being required by the bishop, is to swear twelve lawful men of the vicinage to declare the truth according to their conscience (cap. vi.). Disputes between laymen and ecclesiastics as to whether land is held in frankalmoign are to be determined by recognition of twelve lawful men (cap. ix.). Appeals are to proceed from the archdeacon to the bishop, from the bishop to the archbishop, and from the archbishop to the king, but they are not to proceed any further without the consent of the king (cap. viii.; as to this clause, see Phillimore, *Eccl. Law*, 2nd ed., 1895, vol. ii. p. 965). Persons who refuse to appear upon citation to an ecclesiastical Court may be placed under interdict, but cannot be excommunicated without leave of the king (cap. x.). Archbishops, bishops, and ecclesiastics holding of the king in capite, hold their possessions subject to baronial duties, and are to be present at trials in the Curia Regis until capital sentence be pronounced (cap. xi.). The king is to have the custody and receive the revenues of vacant Sees, and the election of bishops is to be made in the king's chapel, with the assent of the king, and such of the prelates as he shall call for that purpose, and the person elected is, before consecration, to do homage and fealty to the king (cap. xii.). The goods of persons under forfeiture to the king are not to be detained by the Church (cap. xiv.). Pleas of debt, whether or not they involve questions of broken faith, are to be tried by the temporal Courts (cap. xv.; as to this, see Pollock and Maitland, *Hist. Eng. Law*, vol. ii. p. 196).

The Constitutions of Clarendon are properly to be viewed as part of a great scheme of administrative reform by which the debatable ground between the spiritual and temporal jurisdictions is placed on a settled basis, forming the groundwork of the later customary practice on such matters (see Stubbs, *Const. Hist. Eng.*, vol. i. pp. 465, 466). Though directly aimed, as was said in a judgment of the Court of Arches, at the repression of the inordinate claims and privileges of the national Church, they were no doubt indirectly "calculated," as Hume observes, "to establish the independency of England of the papacy," and therefore when the king sought Pope Alexander's ratification of them, that pontiff annulled and rejected all but six out of the sixteen memorable articles. The resistance of Becket, and, still more, the general feeling excited by the wicked and impolitic murder of that prelate, procured the practical abrogation of the articles objected to by the enactments of Edward I. and III., of Richard II., of Henry IV. and V., and of Edward IV. (see *Martin v. Mackonochie*, 1868, L. R. 2 Adm. & Eccl. at p. 150).

[*Authorities*.—Lyttelton, *Life of Henry II.*, 2nd ed., 1767, vol. ii. vol. III.

pp. 354-361, 397, 398; *ibid.* vol. iv. pp. 182-185; Gervase, vol. i. p. 178 (Rolls' ed.); Robertson, *Becket*, vol. v. pp. 71-79 (Rolls' ed.); Reeves, *Hist. Eng. Law*, 1869, vol. i. p. 126; Stubbs, *Select Charters*, 1870, pp. 129-134; Stubbs, *Const. Hist. Eng.*, 1874, vol. i. pp. 464-466; Freeman, *Norman Conquest*, 1876, vol. v. pp. 675-678; Pollock and Maitland, *Hist. Eng. Law*, 1895.]

Constructive Crime — Constructive Offence.—

1. According to Blackstone (1 *Com.* 88), "the law of England does not allow of offences by construction, and no case shall be holden to be reached by penal laws but as are both within the spirit and the letter of the law." By this statement he means no more than that in construing a statute creating an offence or imposing a penalty, the judges will be careful not to stretch or strain the words of the Act so as to include cases not clearly and definitely included, and that even where the words are wide enough to include the case, they will, before deciding that it is to do so, consider the mischief and scope of the Act. The rule is sometimes phrased by the words, "penal statutes are to be construed strictly"; but in modern times this means, "that the Court must see that the thing charged as an offence is within the plain meaning of the words used, and the Court must not strain the words on any notion that there has been a slip or a *casus omissus*, or that the thing is so clearly within the mischief that it must have been meant to be included, if thought of. On the other hand, the person charged has a right to say that the thing charged, though within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other enactment according to the fair common-sense meaning of the language, and the Court is not to find, or make any doubt or ambiguity, in a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument" (*The Gauntlet*, 1872, L. R. 4 P. C. 191). In compliance with these rules, the Courts usually seek to avoid the creation of constructive offences, *i.e.* offences which do not, though in the judge's opinion they should, fall within the legal definition of the offence; they leave to the Legislature the task of saying clearly what acts are to be criminal, and decline to diverge either on the side of severity or lenity to supplement the defects of legislative expression; keeping, however, always in view the rule in criminal cases that the accused is entitled to the benefit of any doubt which arises on construction. But it cannot be said that these efforts are continuously successful; for a good deal of the case law of the Court for Crown Cases Reserved is of a distinctly legislative character (see *Collman v. Mills*, [1897] 1 Q. B. 396).

2. With respect to certain common law crimes, there has in the past been a tendency to create constructive offences, *e.g.* constructive treason, and the efforts of the Star Chamber to create what has been styled criminal equity. In larceny there are certain decisions which recognise a doctrine of "constructive" taking (see LARCENY).

[*Authorities.*—Maxwell on *Statutes*, 3rd ed., 367; Hardcastle on *Statutes*, 2nd ed., 472-480.]

Constructive Residence.—Questions regarding constructive residence have generally arisen in connection with the settlement or re-

moveability of paupers. Constructive residence may be defined as temporary absence from a person's usual residence with an *animus revertendi* (*R. v. Brighthelmstone Guardians*, 1854, 24 L. J. M. C. 41). In *R. v. Abingdon*, 1870, L. R. 5 Q. B. 406 (the case of a boy who was for some years in a school for the indigent blind, but who, during these years, visited and lived with his mother several weeks each summer, and where it was held that he had constructively resided with his mother the whole time), Blackburn, J., said: "I do not like the phrase 'constructive residence'; when a person is physically absent from his place of residence for a time, if he has an *animus revertendi*, his residence continues; and the question in such a case is, whether he continues to be resident, or has ceased to be resident by taking up his permanent residence elsewhere." It is thus a question of fact in each case.

Consul.—A consul is an official appointed by his Government to reside at a definite place abroad, and there fulfil certain duties in the interest of his country and fellow-subjects. An institution somewhat similar in character existed in Greek times. This was the *Proxenus*, "who was considered as the representative of his country, and was bound to protect the citizens who traded at the place" (Boeckh, *Public Economy of Athens*, translation by Sir G. C. Lewis, 1842, p. 50). The same term is also used in modern Greek as the equivalent of consul (Tarring, p. 4).

The meaning of the word "consul" itself descended in almost direct lineage from its ancient signification of a high political magistrate, through the Italian trading communities, to a period when the judicial character of the office became separated from the representative, the former developing into the "consular tribunals," now TRIBUNALS OF COMMERCE (*q.v.*) (still spoken of in France as the *jurisdiction consulaire*) of Southern Europe, and the latter into the modern function bearing the name in question.

"It was natural," says Mr. Spencer Walpole, "that the citizens of one country, congregated in another, should pay some respect to the most influential of their number. Authority was gradually conceded to one or two members of these isolated communities, who as aldermen in the Hanse towns, judge-conservators in Portugal, syndics, jurats, governors, etc., exercised some sort of judicial powers among their fellow-citizens. Italy was the great centre of trade, and in Italy every civil functionary in every petty city adopted the name of consul, once the proudest title ever conferred on man by his fellow-men . . . The supremacy of Italian commerce gradually led to the universal use of the term employed in Italy, and commercial agents in every part of the world became spoken of as consuls" (*Foreign Relations*, p. 153).

According to Lorimer, it was by the Hanseatic League that the consular system was chiefly developed; and it is said that at one time this great trading body maintained more than a hundred consuls in different parts of the world (*Law of Nations*, vol. i. pp. 290 *et seq.*).

The first consul appointed by a king of England appears to have been an Italian, or rather Tuscan, Lorenzo Strozzi, who was made consul at Pisa by Richard III. in 1485 (Spencer Walpole, *op. cit.* p. 154), to which appointment His Majesty was moved "by observing from the practice of other nations the advantage of having a magistrate appointed for settling disputes among them" (Tarring, *op. cit.* p. 3).

With the growth of international trade and intercourse a consular

hierarchy has grown up, of which the following, with the corresponding rank of naval and military officers in the British service, is a table :—

Agents and consuls-general, and commissioners and consuls-general, ranking with, but after, major-generals and rear-admirals.

Consuls-general, ranking with, but after, brigadiers and commodores.

Consuls, ranking with, but after, colonels, and captains R.N. of three years' standing; before all other captains R.N.

Vice-consuls, ranking with, but after, majors and lieutenants R.N. of eight years' standing.

Consular agents, ranking with, but after, captains in the army and lieutenants R.N. of less than eight years' standing (*Foreign Office List*, 1897, p. 294).

Pro-consuls are mere attorneys of the consul, who is responsible for them. Their functions are usually confined to notarial and purely formal matters.

The functions of a consular officer are to watch over the rights of Her Majesty's subjects in his district, to exercise such extra-territorial administrative and registrative duties as Her Majesty's Government or the law intrusts to him, to supply to the Government any information of interest, to send periodical reports on the local import and export trade, to fill up for the Board of Trade certain returns connected with British shipping, to make inquiry on oath respecting offences committed by British seamen on the high seas, to assist British subjects tried for offences in the local Courts and ascertain the humanity of their treatment after sentence, to issue passports to British subjects, to affix *visas* to passports granted elsewhere (see under BRITISH SUBJECT, proviso as to naturalised British subjects when in the country of their previous nationality), to celebrate marriages in certain conditions (see *infra*); and generally to give their assistance on the spot so far as possible where a British subject or a British interest or matter is concerned.

Consular officers among other powers have those of commissioners for administering oaths and of notaries public under 52 Vict. c. 10, s. 6, amended by 54 & 55 Vict. c. 50, s. 2, providing that "every British consul-general, consul, vice-consul, acting consul, pro-consul, and consular agent, acting consul-general, acting vice-consul, and acting consular agent exercising his functions in any foreign place, may, in that country or place, administer any oath, and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit, and notarial act administered, sworn, or done by or before any such person shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom.

"Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorised by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person or of the official character of that person."

The registers which consular officers are officially instructed to keep are :—Register of Correspondence Received; Register of Outward Correspondence; Book for Transcript of Despatches to Foreign Office; Book for Transcript of Despatches to Her Majesty's Minister; Book for Transcript of General Official Despatches and Letters; Register of Births; Register of Marriages in Duplicate; Register of Transcript of Marriage Notices; Register of Fees in Detail, *i.e.* Fee Cash-Book; Register of British Shipping; Register of Transactions in Ships; Register of Seamen; Register of Minutes

of General Meetings; Book of Account-Current with the Secretary of State; Book of Account with the Admiralty (see Inglis, *Consular Formulary*).

Consuls act under a commission from the Government by which they are appointed. The Government of the country in which they are to act grants them the *exequatur* under which their official character is recognised.

In most text-books of international law reference is made to consular conventions and immunities. In this respect Great Britain holds a somewhat anomalous position. In 1872 an elaborate Blue-Book was issued giving copies of consular conventions (c. 632), and the reason given by Mr. (now Lord) Hammond and Mr. (now Sir Henry) Bergne before the committee on the consular service in 1858 why no such conventions were concluded by Great Britain, viz. that it was found utterly impossible to harmonise such a convention with our law, still seems to hold good. In a memorandum prepared by Mr. Bergne for the same committee, he said: "There is in most of our treaties of commerce with foreign Powers an article stipulating that each of the contracting parties shall have the right to name consuls to reside at the ports of the other contracting party; and such consuls shall, before entering upon the exercise of their functions, obtain the usual *exequatur* from the Government to which they are sent; and that they shall further enjoy the same privileges as consuls of the most favoured nation. The operation of this equal and apparently reciprocal stipulation is, however, in practice very unequal; because in most foreign countries a foreign consul has a defined status, or gets his authority enforced by the local functionaries, while in England a foreign consul enjoys no legal status or privilege whatever. The consequence of this state of things is that when a proposition is made to Her Majesty's Government to conclude a convention, guaranteeing to the consuls certain defined privileges, such as personal immunity except in case of crime, exemption from direct taxation, exclusive control in cases of disputes between the masters and crews of vessels of their country, Her Majesty's Government are compelled to decline it, and to state that the law of this country does not afford them the power to contract such an engagement" (Report of Select Committee on Consular Service, 1858, p. 480).

"In the absence of special consular conventions between Great Britain and the other European Powers," says Mr. Inglis, "British consular officers are placed on the footing of those of the most favoured nation, and have to look to the consular conventions of other countries for the functions they are entitled to exercise, and the privileges or exemptions they enjoy" (*Consular Formulary*, p. 70).

In Mohammedan and other non-Christian dominions consuls have a different status from that they hold in Christian countries, their position in the former having generally the character of quasi-diplomatic representation.

The question of the inviolability of consular archives was the subject of controversy a few years back, on the occasion of the French consulate at Florence being invaded by the Italian authorities, and some papers, not belonging to the actual consular documents, being removed. The consuls of the different States immediately met and protested against this act. Correspondence between the French and Italian Governments led to no affirmation of principle. Professor Rivier, Swiss Consul-General at Brussels, in his recent work, *Les Principes du Droit des Gens* (Paris, 1896), however, considers that in order that the privilege of inviolability may hold good, they must

be kept strictly apart from the consul's personal books and papers (vol. i. p. 549).

Consular Marriages.—Under 55 & 56 Vict. c. 23 full provision is made for the celebration of marriage by British consular agents. This Act empowers consuls and consular officers, acting under a marriage warrant signed by a Secretary of State, or duly authorised to act without a marriage warrant, to solemnise marriages in specified places, or to legalise them by their presence at such ceremonies (ss. 8, 11, and 21). One, at least, of the parties to the marriage must be a British subject (s. 1), and both of them must appear before the marriage officer, and make oath that he and she believe that there is no impediment to the marriage, and that they have both for three weeks immediately preceding had their usual residence within the district of the marriage officer (s. 7). By the same section, where either of the parties, not being a widower or a widow, is less than twenty-one years of age, the consent of the person or persons whose consent is required by law, is thereby required, unless it is shown that there is no person having authority to give such consent. A notice of the intended marriage, containing full particulars as to the names, occupations, residence, etc., of the parties, must be signed by one of the parties (s. 2), and after the expiration of fourteen days after the notice has been entered, the marriage may be duly solemnised, unless a lawful impediment has been shown, or the marriage has been forbidden (s. 8). Any person may enter a *caveat* stating a ground of objection to the solemnisation of any marriage, and no marriage thus protested against shall be solemnised until the marriage officer has examined into the matter of the *caveat*, and is satisfied that it ought not to obstruct the solemnisation of the marriage, or the *caveat* is withdrawn by the person entering it (s. 5). The marriage shall be solemnised at the official house of the officer between the hours of eight and three in the day, with open doors, and in the presence of two or more witnesses (s. 8). A register is kept of all marriages, and a copy of the entries for each year must be sent, per a Secretary of State, to the Registrar-General (ss. 9 and 10). "A marriage officer shall not be required to solemnise a marriage, or to allow a marriage to be solemnised in his presence, if, in his opinion, the solemnisation thereof would be inconsistent with international law or the comity of nations" (s. 19).

Consular Jurisdiction.—The jurisdiction exercised by British consular officers in certain countries beyond Her Majesty's dominions in matters which in other countries come exclusively under the control of the local magistracy depends on the extent to which that right has been conceded by the rulers of those countries. (See CAPITULATIONS and FOREIGN JURISDICTION.)

[*Authorities.*—Hall, *Foreign Jurisdiction of the British Crown*, Oxford, 1894; Tarring, *British Consular Jurisdiction in the East*, London, 1887; Inglis, *Consular Formulary*, London, 1879; Rivier, *Principes du Droit des Gens*, Paris, 1896; Twiss, *Law of Nations in Time of Peace*, Oxford, 1884; Phillimore, *International Law*, vol. iii., London, 1873; Tuson, *British Consuls' Manual*, London, 1856; *Guide Pratique des Consulats*, par MM. De Clercq and Vallat, Paris, 1858; Warden, *Origin and Progress of Consular Establishments*, Paris, 1813.]

Consultation (in Litigation).—This term signifies a meeting of two or more counsel with the solicitor who is instructing them in a case (the client often being present), for the purpose of advising or deliberating upon it. See CONFERENCE.

Consumable Articles.—A specific bequest for life of things *quæ ipso usu consumuntur* is a gift of the property, and there can be no limitation over after such life interest (*Randall v. Russell*, 1817, 3 Mer. 194). But this rule does not apply where the bequest is of articles forming part of the testator's stock in trade (*Phillips v. Beal*, 1862, 32 Beav. 25), unless the tenant for life is declared not to be liable for any diminution or depreciation of the same (*Breton v. Mockett*, 1878, 9 Ch. D. 95); nor does the rule apply where the gift to the tenant for life is of so much of the consumable articles as may be required for consumption in the house (*In re Colyer, Millikin v. Snelling*, 1886, 55 L. T. 344).

If such articles are included in a residuary bequest for life, they must be sold and the interest paid to the tenant for life (*Randall v. Russell, supra*).

Consumed on the Premises.—See LICENSING.

Contagious Diseases.—See PUBLIC HEALTH.

Contango.—See STOCK EXCHANGE.

Contemporanea expositio est optima et fortissima in lege.—Where the meaning of an old statute or legal document comes into question, the Courts will, in case of doubt or ambiguity, accept as the true meaning the sense in which it is shown to have been taken at or near the time when it passed or first came into use (*Gorham v. Bishop of Exeter*, 1850, 15 Q. B. 52; at p. 73; *Morgan v. Crawshaw*, 1871, L. R. 5 H. L. 304, 320). This rule of construction flows from recognition of the fact that documents must be construed in accordance with the meaning of the words used in them at the date when they were framed, and from the presumption that the meaning put on them by judges, conveyancers (*Ford v. Hill*, 1879, 10 Ch. D. 370), or merchants at that date was their then natural and ordinary meaning. This maxim is closely allied with two others—*optima legum interpretæ consuetudo* and *communis error facit jus*; but both apply more properly to contracts than to statutes (*Tancred, Arroll, & Co. v. Steel Co. of Scotland*, 1889, 15 App. Cas. 141). The rule of *contemporanea expositio* is usually applied only to Acts of some antiquity (*Clyde Navigation Trustees v. Laird*, 1883, 8 App. Cas. 658, 670, 673); but has been accepted as to an Act as late as 1834 (*R. v. Leveson*, 1869, L. R. 4 Q. B. 394). It is not conclusive upon the judges where the old construction is clearly erroneous (*Hamilton v. Baker*, 1889, 14 App. Cas. 221); but Courts will be reluctant to upset old decisions on construction, especially where they affect the form of contracts (*Lucas v. Dixon*, 1889, 22 Q. B. D. 357). The widest pronouncement as to the application of the rule is in *Read v. Bishop of Lincoln*, [1892] App. Cas. 644; where it was laid down that historical investigation might be made as to contemporaneous usage in order to elucidate the meaning of an old statute where the facts elicited were ancient facts of a public nature.

[*Authorities.*—See Maxwell on *Statutes*, 3rd ed., 423–429; Hardcastle on *Statutes*, 2nd ed., 93–108, 168.]

Contemporaneous Conveyances.—Where two or more deeds are actually contemporaneous or executed “within so short an interval that, having regard to the nature of the transaction, the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to show the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together, in the view of the Court, make up one document for this purpose” (per Jessel, M. R., in *Smith v. Chadwick*, 1882, 20 Ch. D. 62, 63). Where two deeds bear the same date the Court will inquire which was in fact executed first; if, however, there is evidence in the deeds of an intention that they should be read either *pari passu*, or one before the other, the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties (*Gartside v. Silkestone, etc., Co.*, 1882, 21 Ch. D. 762).

Contemporaneous Explanations.—Explanations substantially contemporaneous with a fact in issue, or relevant to the issue, form part of the *res gestæ*, and are admissible in evidence (see Stephen, *Digest of Law of Evidence*, art. 8, and note v.). See EVIDENCE, *Res Gestæ*.

Contempt of Court.—Contempt, in the legal acceptance of the term, primarily signifies disrespect to that which is entitled to legal regard. In its origin, all legal contempt will be found to consist of an offence more or less direct against the Sovereign himself as the fountain-head of law and justice, or against his palace, where justice was administered. This clearly appears from the old cases, one of which is thus stated: “J. of F. went armed in the palace which was shown to the Council of the King, by which he was taken and disarmed before Justice Shard, and committed to the prison of the Marshalsea, and could not be bailed till the king had sent his will” (5 Vin. Abr. tit. “Contempt,” p. 442, citing 24 Edw. III. c. 33). It is not, however, in its primary meaning of contempt of the king, his person, government, or prerogative, but in its secondary or derivative meaning of an offence against the Courts or persons to whom the judicial functions of the Crown are delegated that the word contempt is understood when used in the technical or legal expression Contempt of Court.

Definitions of Contempt of Court.—Contempt of Court (which has been irreverently termed “a legal thumbscrew”) is so manifold in its aspect that it is difficult to lay down any exact definition of the offence. In Viner’s *Abridgment* (tit. “Contempt” A), it is defined or described to be “a disobedience to the Court, an opposing or a despising the authority, justice, or dignity thereof. It commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court” (see per Williams, J., in *Miller v. Knox*, 1838, 4 Bing. N. C. at p. 588). Defined shortly (as it was by Sir William Blackstone), “Contempt is a disobedience to the rules, orders, or process of a Court, or against the king’s prerogative.” These short definitions (good so far as they go) are scarcely sufficient. Lord Chancellor Hardwicke, in the case of the printer of the *St. James’s Evening Post* (1742, 2 Atk. p. 471), said: “There are three different sorts of contempt, one kind of contempt is *scandalising the Court itself*. There may be also a contempt of this Court in *abusing parties who are concerned in cases here*. There may be also a

contempt of this Court in *prejudicing mankind against persons before the cause is heard*"; and he adds: "There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

Contempt of Court involves two ideas, *contempt of its power* and *contempt of its authority*—the word *power* involving the ability to enforce obedience to its orders, and the word *authority* its jurisdiction to declare the law and the rights of parties (*R. v. Almon*, 1765, Wilm. 256). Speaking generally, contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with, or prejudice parties litigant, or their witnesses during the litigation. For a definition of contempt, see the opinions of the judges in *Miller v. Knox* (*supra*). Though every act of disobedience to the rules, orders, process, or dignity of a Court may technically be termed a *contempt*, the term is generally, or at least with greater propriety, applied to any disrespect or indignity offered to judges while sitting in judgment, or on account of their proceedings in their judicial capacity (*Bell's Digest of the Law of Scotland*, p. 224).

Inherent Power of Committal.—"Every Court of record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the Court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the Court, and may immediately order them into custody" (2 *Bac. Abr.*, 7th ed., p. 399).

It is the undoubted right of a superior Court to commit for contempt; and there is no necessity to specify the particular matter which constitutes the contempt (per Erle, C.J., in *Ex parte Fernandez*, 1861, 10 C. B. N. S. at p. 6), citing the case of the *Sheriff of Middlesex*, 1841, 11 Ad. & E. 273; 1840, 8 Dowl. P. C. 451, *nom. R. v. Evans*. But the practice now requires that the alleged offence should be specified. The usual criminal process to punish contempts was found to be cumbrous and slow, and therefore the Courts early assumed jurisdiction themselves to punish the offence summarily, *brevi manu*, so that cases might be fairly heard, and the administration of justice not interfered with. A Court of justice, without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are intrusted to its care, would be an anomaly which could not be permitted to exist in any civilised community. "From the earliest period of our history this authority has been exercised. The year-books record instances of such commitments" (per Best, J., in *R. v. Davison*, 1821, 4 Barn. & Ald. at p. 340; 23 R. R. 295).

It is therefore but consonant with sound sense that we should find it an acknowledged principle that the power of summarily punishing for contempt has been inherent in all Courts of record from time immemorial (see the opinion of the judges in *Miller v. Knox*, 1838, 4 Bing. N. C. 574; *R. v. Almon*, 1765, Wilm. 243; *Black. Com.* bk. iv. c. 20, iii.), and is coeval with their foundation and institution as part of the law of the land (Wilm. at p. 254). Without such protection, Courts of justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible. Hence it is that the summary power of punishing for contempt has been given to the Courts—"to keep a blaze of glory round, and to deter people from attempting to render them contemptible in the eyes of the public" (Wilm. at p. 270).

Courts which have Jurisdiction with regard to Contempt.—The most

extensive jurisdiction in respect of contempt is that originally attaching to the superior Courts of record (Hawk., P. C., bk. ii. c. 22), including the commissioners of assize under their various commissions (*Ex parte Fernandez*, 1861, 10 C. B. N. S. 3), which gives them full cognisance of and power to deal with every species of contempt. A Court of oyer and terminer at the assizes is a superior Court (*In re M'Alcece*, 1873, 7 Ir. Com. L. 146), and has full jurisdiction in matters of contempt. There is no appeal except to the Sovereign from an order of judges of assize committing or fining for contempt (*Ex parte Fernandez, supra*). The jurisdiction in this, as in other matters, of the old superior Courts at Westminster is now by virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 16), vested in Her Majesty's High Court of Justice, and is exercisable by the several Divisions of that tribunal.

The Court of Appeal also, as a superior Court of record (36 & 37 Vict. c. 66, s. 18), has a similar jurisdiction either original or derivative; and equal authority in this respect is included in the jurisdiction of the Lord Chancellor and the Lords Justices in Lunacy (*Ex parte Jones*, 1806, 13 Ves. 237). A master in lunacy may commit for contempt while executing an inquisition with a jury (Lunacy Act, 1890, s. 99; *In re B.*, [1891] 3 Ch. 274-276), or without a jury (Lunacy Act, 1891, s. 29; *In re B.*, [1892] 1 Ch. 459).

The jurisdiction of inferior Courts of record (such as the Court of Quarter Sessions, the Mayor's Court and County Court) is confined to such contempts as are perpetrated *in facie curiæ* (as in *R. v. Lefroy*, 1873, L. R. 8 Q. B. 134, and *R. v. Jordan*, 1888, 57 L. J. Q. B. 483), and does not extend to such as are committed out of Court unless by virtue of some statutory enactment (*R. v. Lefroy, supra*; *R. v. Judge of Brompton County Court*, [1893] 2 Q. B. 195; *Ex parte Pater*, 1864, 5 B. & S. 299; *Carus Wilson's case*, 1845, 7 Q. B. 984).

A County Court judge has no jurisdiction to commit for contempt not committed in the face of the Court as provided by the County Courts Act, 1846 (re-enacted in the statute of 1888, see *R. v. Lefroy, supra*). But a County Court judge sitting in bankruptcy has the powers and jurisdiction of a judge of the High Court, and has the like power to commit (*R. v. Judge of County Court of Surrey*, 1884, 13 Q. B. D. 963). A County Court judge has no power to deal summarily with contempt in practising in his Court as a solicitor without being duly qualified, which offence is created a contempt by sec. 26 of the Solicitors Act, 1843 (*R. v. Judge of Brompton County Court, supra*). But a County Court has, under sec. 89 of the Judicature Act, 1873, with regard to all causes of action within its jurisdiction, power to enforce obedience to its orders by committal; this power extends to interlocutory as well as to final orders (*Richards v. Cullerne*, 1881, 7 Q. B. D. 623). No appeal lies from an order of a County Court judge imposing a fine under sec. 48 of the County Courts Act, 1888, for assaulting an officer of the Court (*Lewis v. Owen*, [1894] 1 Q. B. 102). The Mayor's Court is an inferior Court (*Mayor of London v. Cox*, 1867, L. R. 2 H. L. 239, and *Appleford v. Judkins*, 1878, 3 C. P. D. 489). Courts not of record have no jurisdiction to punish for contempt of Court unless it is specially conferred by statute (*M'Dermott v. Judges of British Guiana*, 1868, L. R. 2 P. C. 341). Magistrates sitting alone or in petty or special sessions appear to be under a like disability, though they may enforce order in their Courts by ejecting any offender (*Oke. Mag. Syn.* 12th ed. 150; see also *Burns, J. P.*, 30th ed., vol. iii. 142); a revising barrister has only the like power (28 Vict. c. 36, s. 16; *Willis v. MacLachlan*, 1875, 1 Ex. D.

376). The Royal Court of Jersey (*Carus Wilson's case*, 1845, 7 Q. B. 984); the Chancery Court of the Isle of Man (*In re Crawford*, 1849, 13 Q. B. 613); and the House of Keys in the Isle of Man, acting in the exercise of its judicial, but not of its legislative, functions (*Ex parte Brown*, 1864, 5 B. & S. 280), have all power to commit for contempt; and where it is consistent with the practice of the particular Court, it may commit "until further order" (*In re Crawford, supra*).

Contempts committed before judges of the High Court in chambers, and before the official referees, masters, registrars, or other officers of the High Court, to whom quasi-judicial functions are delegated (whose offices are part of the Court itself), or within the precincts of their chambers, are properly cognisable and punishable by the Court to which the judges or officers are attached, and not punishable by themselves (*French v. French*, 1824, 1 Hog. 138; *Ex parte Burrows*, 1803, 8 Ves. 535; *Ex parte Wilton*, 1842, 1 Dowl. N. S. 805; *In re Johnson*, 1888, 20 Q. B. D. 68); though they would presumably have power in a case of insult or disturbance to eject the offender or suspend their sitting. But the Court, to which any such judge or officer is attached, can and will subsequently punish for any such contempt (*In re Johnson, supra*, and see *Kirby v. Webb*, 1887, 3 T. L. R. 763). It would seem, therefore, that for insults offered to a judge sitting in chambers he cannot himself punish, but that the Court will, on application made to it for the purpose, punish such an offence (*In re Johnson, supra*; *In re Tyrone Election Petition, Carson's case*, 1873, Ir. R. 7 C. L. 242). A judge sitting as a Court may make an order of committal wherever he may sit, and even at his residence (*In re Clarke*, 1842, 11 L. J. Q. B. 75, and see *Petty v. Daniel*, 1887, 34 Ch. D. 172). The rules of the Supreme Court expressly provide (Order 36, r. 51) that an official referee shall not attach or commit. It is a contempt of Court to insult a suitor or his counsel while attending in the master's office, and if such a contempt is committed the party will be attached at once on the production of the master's certificate (*French v. French*, 1824, 1 Hog. 138). Breaking open a desk in the registrar's office was dealt with as a contempt of Court (*Ex parte Burrows*, 1803, 8 Ves. 535).

The various Kinds of Contempt of Court.—It is difficult to classify the various kinds of contempt of Court, but, for convenience, they may be considered under two heads: (1) contempts direct; (2) contempts indirect, or consequential. See Oswald on CONTEMPT, 2nd ed.

Direct Contempts.—Direct contempt is more or less spontaneous and aggressive on the part of the offender, and does not fall within the class of cases where the offence is constituted by disobedience to, or neglect of, some express direction of the Court. It is aimed either expressly against the dignity or authority of the Court itself, in the persons of its judges or officers in such a manner as to amount to actual or constructive insult or resistance, or by acts tending to obstruct the course of justice. This contempt may be committed either by acts in the face of, or within the precincts of, the Court (*sedente curia*), or by acts done away from the Court. Of contempts committed in the face of the Court the most gross are those which involve actual or threatened violence to the person of the presiding judge, or the officers of the Court in attendance. An early instance of an offence of this nature is furnished in the well-known story of the behaviour of Henry v. (when Prince of Wales) to Gascoigne, C.J. No authentic report of this incident exists, but it was referred to by Lord Selborne as an authority in *Watt v. Ligertwood*, 1874, L. R. 2 H. L. n. (1), at p. 367), and is related in Campbell, *Lives of the Chief Justices*, vol. i. p. 127. A

modern example of violence to a judge was afforded in the outrage committed upon Malins, V.C., on the 16th March 1877, by a man (stated to have been an American) who threw an egg at the learned judge, while leaving the bench in his Court in Lincoln's Inn, for which offence the offender was forthwith committed by the judge to prison (*In re Cosgrave*; Seton, 5th ed., 406; the *Times*, 17th March 1877). The Court itself may also be insulted by conduct out of Court. Thus, it is a direct contempt of Court to send libellous, scandalous, or threatening letters (*In re Charlton*, 1836, 2 Myl. & Cr. 316; *Macgill's case*, 1748, 2 Fowl. Ex. Pr. 404; *In re Wallace*, 1866, L. R. 1 P. C. p. 283), or communications intended to influence the decision, or offering bribes (*Martin's case*, 1831, 2 Russ. & M. 674; *Ex parte Jones*, 1806, 13 Ves. 237; *In re Sombre*, 1849, 1 Mac. & G. 116), to a judge or officer of the Court; or to interfere without leave with a sale directed by the Court, the conduct of which has been given to another party (*Dean v. Wilson*, 1878, 10 Ch. D. 136); or to libel, by circular or otherwise, a business carried on by a receiver and manager (*Helmore v. Smith*, 1887, 35 Ch. D. 449); or to induce a receiver in bankruptcy not to interfere in the carrying on of business by the debtors (*Ex parte Hayward*, *In re Plant*, 1881, 45 L. T. 326); or to advertise the intended delivery of a sermon, "with special reference to the trial in which the town is deeply interested" (*Mackett v. Commissioners of Herne Bay*, 1876, 24 W. R. 845).

Indirect Contempts.—The indirect or consequential forms of contempt of Court arise when a judgment or order of the Court, after having been pronounced or made, has been disobeyed, and it becomes necessary to enforce such judgment or order (assuming it to be such as the law now permits to be enforced), by means of process, against the person of the party refusing or neglecting to obey or observe it. Such process is effected by the issue of a writ of attachment or by an order of committal.

Indirect contempts are occasioned by disregarding injunctions, or interfering with wards, receivers, and other persons entitled to the protection or acting under the authority of the Court. Any person against whom an injunction of the High Court has been granted is liable to be committed to prison for contempt, or to have a writ of attachment issued against him, and to be arrested thereunder for his contempt, if he disregard or commit any breach of the injunction, whether mandatory or restraining in its form, or whether it be made *ex parte* or upon hearing both sides, or be interim or perpetual. And a person not a party to the action or included in the injunction may be committed for contempt of Court, who, knowing of the injunction, aids and abets the person enjoined in committing a breach of the injunction (*Seaward v. Paterson*, [1897] 1 Ch. 545). In the case of a corporation or a peer, observance of the injunction is enforced by sequestration.

An undertaking entered into or given to the Court by a party, or his counsel or solicitor, is equivalent to, and has the effect of, an injunction, so far as any infringement thereof may be made the subject of an application to the Court to punish for its breach (*London and Birmingham Railway Co. v. Grand Junction Canal Co.*, 1835, 1 Rail. C. 224); but it appears that in the case of enforcing an undertaking, proceedings by committal may be the only remedy (see per Chitty, J., *Callow v. Young*, 1886, 55 L. T. 543; W. N. 1886, pp. 183, 209). Any interference without the leave of the Court by third parties, with the possession of a receiver appointed by the High Court, is a contempt of Court, and that whether by anyone claiming paramount to or under the right which the receiver was appointed to protect (*Kerr on*

Receivers, 2nd ed., pp. 124–126, and cases cited there; see also *Searle v. Choat*, 1884, 25 Ch. D. 723).

The same rule extends to a manager of a business (*Helmere v. Smith* (2), 1887, 35 Ch. D. 449); a sequestrator (*Angel v. Smith*, 1804, 9 Ves. 336; 7 R. R. 214); an official liquidator (*In re Pound*, 1889, 42 Ch. D. at p. 411); a receiver or trustee in bankruptcy; a sheriff after he has seized under a writ of execution (*Cooper v. Asprey*, 1863, 32 L. J. Q. B. 209); a committee of a lunatic so found by inquisition; all of whom have been appointed by, and are therefore officers of, the Court.

It is also a contempt of Court to remove without leave a ward of Court out of the jurisdiction, or without leave to marry a ward of Court, or to seduce or otherwise be guilty of misconduct towards, or in any way interfere with a ward of Court. It is no answer where this offence is charged to allege that the party guilty of the acts complained of did not know that the infant in question was a ward of Court (*Herbert's case*, 1731, 3 P. Wms. 116); and the Court will punish for the contempt not only the parties principally concerned in the offence against the ward, but also any one aiding or abetting such offence. The punishment for offences against wards is committal.

Distinction between Committal and Attachment.—Under the old law there were several points of difference between committal and attachment, e.g. it was not necessary to serve notice of motion for attachment, whereas it was necessary in cases of committal. Attachment issued at the instance and at the risk of the party aggrieved, so, too, while committal was the proper remedy for doing a prohibited act, attachment was the proper remedy for neglecting to do some act ordered to be done (see per Chitty, J., *Callow v. Young*, 1886, 56 L. T. N. S. 147). Since the Judicature Act of 1873 came into operation neither attachment nor committal can be obtained without notice of motion, but in cases of committal the notice of motion must be served personally on the person sought to be committed, and, in cases of attachment, service of the notice of motion may be effected upon the solicitor on the record of the person sought to be attached. Thus, for most purposes, the distinction between committal and attachment has been abolished (see per Jessel, M. R., in *Sprunt v. Pugh*, 1877, 7 Ch. D. 567, as cited by Chitty, J., in *Harvey v. Harvey*, 1884, 26 Ch. D. 654). There is, however, a distinction between committal and attachment in the process by which they are respectively carried out. The operation of an order for committal is more summary and expeditious than that of a writ of attachment. In the case of committal, the person in contempt is taken, wherever he may be, under the order by the tipstaff of the Court and lodged in Holloway gaol; but in the case of attachment a writ is obtained from the central office of the Supreme Court, and directed to the sheriff of the bailiwick in which the person sought to be attached is supposed to be. The writ is executed by the sheriff's officer, and can only be so executed within the bailiwick of the sheriff to whom it is directed, and if the offender cannot be found within that bailiwick a fresh writ must be obtained. The person in contempt (when caught) is lodged in the county or other gaol of the place where the writ is enforced.

If there is any doubt as to the proper remedy to be pursued, it is probably the safest course to ask by the notice of motion for attachment or committal in the alternative.

Purging Contempt.—It is necessary for a person judged to be in contempt to clear or purge his contempt. "Purgation is the purging or clearing a man's self of crime" (4 Black. Com. 342). "An ordinary contempt in process,

as it is a matter merely between the parties, may be cleared by the contemnor doing the act, by the non-performance of which the contempt was incurred, and paying to the other party the costs occasioned by his contumacy" (Daniells, *Ch. Pr.*, 6th ed., p. 900). Where the contempt has arisen from doing an act contrary to an injunction not to do it, the contempt is cleared by an apology to the Court, and making reparation for the act improperly done, and paying the costs. Where the contempt is one of the Court itself, it is cleared by submission and apology to the Court and payment of the costs. All contempts are also cleared after an order of the Court discharging the offender from further punishment, *e.g.* if, upon the application of the offender for release from custody, that release is ordered, he cannot be again punished for the same contempt; but terms for his release from custody may be imposed, which he must observe prior to obtaining such release.

When the duration of the imprisonment for contempt has been fixed by the law (*i.e.* the Act of Parliament giving the authority to imprison), or by the order for the imprisonment, the person imprisoned is entitled to his discharge from custody without any order for the purpose, immediately upon the expiration of the time limited for the imprisonment, and indorsed on the writ of attachment, or mentioned in the order to commit (*Greaves v. Keene*, 1879, 4 Ex. D. 73; and *Henderson v. Preston*, 1888, 21 Q. B. D. 362). In other cases the party must apply to the Court either to discharge the order for irregularity, or for an order for his discharge from custody. An order will, in general, only be discharged for irregularity when it has been obtained *ex parte*, unless, indeed, the irregularity was not apparent, and could not have been discovered when the application for the imprisonment was originally made. An order, however, which has been irregularly obtained, is valid until discharged (*Blake v. Blake*, 1844, 7 Beav. 514). In applying to discharge the order for imprisonment upon the ground of irregularity in obtaining it, the question whether or not the irregularity has been waived must be considered. Where, however, the proceedings, or the order founded thereon, are altogether void, no question of waiver arises, as no waiver will render valid void proceedings, or a void order; but immediate application should be made to set aside the void proceedings, or to discharge the void order. The principle of waiver, therefore, applies only to an irregular, and not to an erroneous, order.

Nature and Extent of Punishment.—The punishment for contempt of Court is limited now to fine or imprisonment; although in bad cases both are inflicted; but it is difficult to say what the Court considers a sufficient punishment, or a sufficient duration of imprisonment for a contempt of Court. All the facts and circumstances of the particular case, and the nature of the contempt, are taken into consideration; but the Court generally in practice leans to the side of mercy. The duration of the imprisonment should not be too long or severe (*In re Davies*, 1888, 21 Q. B. D. 236).

Contempt of Parliament.—See PARLIAMENT.

Contentement.—Coke in his *Institutes* (ii. 28) explains "contentement" as being a man's "countenance which he hath together with and by reason of his freehold." Blount in his *Law Dictionary*, after giving the same explanation, says: "I rather think that contentement signifies that which is necessary for the support and maintenance of men according to

their several qualities, conditions, or state of life, as in *Magna Charta*, viz. it is enacted that a freeman shall not be amerced but *secundum magnitudinem delicti, salvo sibi contememento suo*."

Context.—It is a well-established rule of construction common to law and literature, and applicable alike to statutes and all other writings, that the meaning of a word employed is to be determined not by taking the word in isolation, but by taking it with its context, *i.e.* as a component part of the compound expressions which make up the clause, or even the whole document, to be interpreted (*Colquhoun v. Brooks*, 1889, 14 App. Cas. 493). This rule, like all rules of construction, is not absolute, nor a rule of law. It is recognised in the modern statutory definitions, which provide for the interpretation of specified terms in a particular way, "unless repugnant to subject or context," or "unless a contrary intention appears." See Interpretation Act, 1889 (52 & 53 Vict. c. 63).

[*Authorities.*—Elphinstone, *Conveyancing*, 3rd ed., 29; Maxwell on *Statutes*, 3rd ed., 40; Hardcastle on *Statutes*, 2nd ed., 173.]

Contingent Class.—A class which can only be ascertained on the happening of a specified contingency—*e.g.* a gift to children who attain twenty-one is a gift to a contingent class, which, in general, will only vest in those children who attain that age. See Theobald, *Law of Wills*, 4th ed., pp. 455, 461.

Contingent Gift.—A gift to take effect on the happening of some contingency. A future devise of land does not carry the intermediate rents to the devisee, nor in general will a contingent specific gift of personalty, but a specific bequest "segregated from the mass of the testator's estate to go on a contingency, carries with it all accretions to the contingent legatee on the happening of the contingency" (*In re Clements, Clements v. Pearsall*, [1894] 1 Ch. 665; *In re Medlock, Ruffle v. Medlock*, 1886, 55 L. J. Ch. 738). So also a future gift of personal residue or a mixed fund carries with it previous income not expressly disposed of. See Theobald, *Law of Wills*, 4th ed., pp. 145 *et seq.*

Contingent Interest.—A future interest that is to depend upon an event that is uncertain, *e.g.* a contingent remainder (see CONTINGENT REMAINDERS).

At common law a contingent interest was inalienable, although it might be released, and might also be assigned in equity. Such an interest could be devised under the Statute of Wills, unless the person who was to take was not in any degree ascertainable before the contingency happened (per Lord Ellenborough in *Doe v. Tomkinson*, 1813, 2 M. & S. 164); but a larger power of devising such interests was given by the Wills Act, 1837, sec. 3 of which, *inter alia*, provides that "all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will"; and finally, by sec. 6 of

the Real Property Act, 1845, "a contingent, an executory, a future interest and a possibility coupled with an interest in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained . . . may be disposed of by deed."

Contingent Legacy. — A legacy given contingently on the happening of a certain event. A common illustration is found in the case of a legacy given to a person *provided* he attains twenty-one. In such a case, if the legatee dies before attaining twenty-one, the legacy lapses; a contingent legacy is thus distinguished from a vested legacy, where a present interest is given to the legatee although the time of its payment may be postponed. [See Williams, *Executors and Administrators*, 9th ed., vol. ii. pp. 1071 *et seq.*]

Contingent Remainders. — A contingent remainder may be defined as an estate limited, to take effect in remainder (*q.v.*), that is, to come into possession on the regular determination of some prior estate less than fee-simple (called the *particular* estate), but to arise only in case some event or events, which may or may not happen before the particular estate shall come to an end, shall happen. It is an estate in remainder of which the vesting in interest is made subject to a condition precedent (see Fearn, C. R. 3, 16, 221, 9th ed.; *Smith v. Parkhurst*, 18 Vin. Abr. 413; 3 Atk. 135; Co. Litt. 265 a, n. (2)). The commonest instance of a contingent remainder is an estate limited, after the determination of an estate given to A. (a bachelor) for life, to A.'s first son in tail male or in tail. Such limitations are regularly employed in every deed disposing of lands in what is called strict settlement, that is, bestowing the lands on the members of a family in succession according to seniority, but with a certain preference for males over females. When a settlement of this kind is made, life estates are invariably given to the living members of the family, with remainder after each life estate, to the life-tenant's sons successively in tail male; and there are usually further remainders (of which the exact place in the settlement varies according to the circumstances) to each life-tenant's sons in tail general, and to his daughters, either successively or as tenants in common in tail (see Davidson, *Prec. Conv.* iii. 324–330, 3rd ed.; Williams on *Settlements*, 217, 218, 288–291). It is obvious that all such estates are subject to the condition precedent that a son or daughter (as the case may be) shall be born to the life-tenant in question; otherwise the estate limited can never take effect. But it is by no means essential to the creation of a contingent remainder that it should be limited to an unborn or unascertained person; remainders limited to persons perfectly ascertained at the time of limitation may be equally contingent, as where lands are granted to A. for his life and after his death, if he shall leave no issue living at the time of his death, to B. in fee. Here B. is supposed to be a living person, perfectly capable of receiving a grant of land; but in the case put the remainder limited to him is as contingent as a gift to the unborn. For if A. die leaving issue alive, B. will take no estate at all in the land; as the event, in which the estate was given to him, did not happen. The distinction between remainders limited to unborn or otherwise unascertained persons and those given to ascertained persons in an uncertain event has been put forward as a leading classification of contingent remainders (*Smith*

v. *Packhurst*, 1741, 3 Atk. 139; 2 Black. Com. 169, 170). And Mr. Fearne, whose celebrated treatise on Contingent Remainders is the foundation of all modern learning on the subject, arranged them, for the purposes of examination, into no less than four classes. But the main thing to remember is that all contingent remainders have the same characteristic of being limited to take effect only upon the fulfilment of some condition precedent. It is this which especially distinguishes them from vested remainders (*q.v.*). These are estates so limited in remainder that their taking effect in possession is simply postponed to the regular determination of the prior or particular estate, and is dependent upon no other condition whatever; as where land is given to A. for life, and after his death to B. in fee. Here B.'s estate is vested in interest; because his right to have possession of the land, though postponed till after the determination of A.'s life estate, is nevertheless an absolute right, and is independent of the fulfilment of any condition, which may or may not be satisfied in A.'s lifetime. B.'s estate, having this absolute quality, is from its commencement capable of taking in effect in possession, whenever the particular estate shall end; and this present capacity for taking effect in possession is the particular mark of a vested remainder (Fearne, C. R. 216, 9th ed.; Co. Litt. 165 a, n. (2)).

The ancient common law allowed only of the creation of vested estates in land. It is true that Bracton suggested (fo. 13 a) that a feoffment might well be made by way of a gift in joint tenancy to a concubine and her children then born or afterwards to be born. And this suggestion was copied into Fleta (fo. 179) and Britton (i. 231, ed. Nichols). But the annotator of Britton, whom Mr. Nichols has identified with John de Longueville, dissented emphatically from the pronouncement in the text. And he pointed out that in a feoffment a certain purchaser must be named, for the whole estate is thereby transferred away from the feoffor and immediately vested in the feoffee, so that those who are not *in rerum natura* at the time of the gift can claim no part in what is bestowed (Britt. 1, 231, n. (k), ed. Nichols). This opinion, which, it will be observed, is expressed of gifts of land in possession, appears to have prevailed for some time as to gifts in remainder also. And it was considered that on a feoffment professing to be a feoffment in fee, the whole fee must immediately pass away from the feoffor, so that if the land were given to one for life and after his death to another in fee, the latter must be a person perfectly capable, at the time of the gift, of taking the remainder so limited to him; otherwise the gift in remainder would be void (Y. B. 11 Hen. iv. 74, pl. 14, per Hankey; Litt. s. 721). In the reign of Henry VI., however, an inroad was made on this principle; and it was held that if land were given to one for life and after his death to some person not immediately ascertained, as to the heir of A., a living person, in fee, the remainder might take effect in possession, if the person to whom it was limited were ascertained before the life estate came to an end (Y. B. 9 Hen. vi. 24 a; Fitz. Abr. Feoffments and Fairs, 99). This appears to have been the beginning of contingent remainders. In the case put, the remainderman is not ascertained at the time of the gift, for *nemo est hæres viventis*. During A.'s lifetime, the remainder is contingent, being subject to a condition precedent, which can only be fulfilled on his death. For though A. may have an heir apparent or an heir presumptive, there is no certainty that either will survive to be his heir. But on A.'s death his heir is ascertained; and if A. die before the life tenant there will then be a person perfectly capable of succeeding to the possession of the land, should the life estate determine at any time. The remainder will therefore have

vested, and may take effect as well as if it had been vested from the time of its creation. The law so laid down was upheld and remains good to the present day (Perk. s. 52; Co. Litt. 378 *a*). The doctrine of contingent remainders does not, however, appear to have been put to much use in conveyancing practice until after the Statute of Uses (27 Hen. VIII. c. 10). This Act fairly uprooted the long prevailing custom of settling lands by means of feoffees intrusted to execute the feoffor's will, and constrained landowners and their legal advisers to seek after new methods of assurance. The plan adopted was to limit the lands, by way of contingent remainder, after a life estate given to the settlor or his living children, to his or their unborn sons successively in tail. About the middle of the seventeenth century this became the established mode of settlement; and it has lasted to the present day (see Papers read before the Juridical Society, i. 45). Here it may be observed that, after contingent remainders were allowed, great difficulty was long felt in breaking in upon the old rule that on a feoffment in fee the fee-simple must altogether depart from the feoffor. To reconcile this rule with the existence of contingent remainders, it was said that, on the creation of a contingent remainder in fee-simple, the fee was in abeyance until the contingency happened (Co. Litt. 342 *b*). The modern opinion is that the fee remains with the grantor in such cases until the remainder vests (Fearn, C. R. 351-364; Williams on *Real Property*, 268, 13th ed.; 334, 18th ed.).

Although contingent remainders became thus firmly established, the possibility of their taking effect is by no means dependent only on the fulfilment at any time of the condition precedent to their vesting. The policy of the law is against the settlement of land in perpetuity; it is jealous of devices calculated to place land for ever beyond reach of the power of alienation. And principally to avoid this end certain rules have been evolved, which must be observed in the creation of contingent remainders, or the gift made contingently will never be able to take effect. The first of these rules is that the seisin, meaning the freehold possession (Co. Litt. 17 *a*), must never be without an owner; which is otherwise expressed in saying that every contingent remainder of an estate of freehold must have a particular estate of freehold to support it. This rule, though it proved a valuable check on the creation of perpetuities, was not apparently designed as such; it seems to be simply an effect of the common law rule that delivery of possession is necessary to the validity of a gift of lands. As is well known, the common law method of conveying lands was by a feoffment, that is, a gift, properly of a fee, but, as the term came to be used, of a freehold estate (Litt. s. 57; Co. Litt. 9 *a*); and a feoffment was void unless accompanied by livery of seisin, or formal delivery of possession (Litt. ss. 59, 60, 66, 70). It followed that at common law no gift could be made of a freehold estate to commence at a future time, save by way of remainder. For such a gift, if made without present livery, would be void under the above-mentioned rule; and it would be equally void if made with present livery, as the expression of an intention to give at a future time would be repugnant to, and would nullify the expression, requisite to good livery of seisin, of intention to deliver *immediate* possession of the land (*Buckler's case*, 2 Co. Rep. 55; *Barwick's case*, 5 Co. Rep. 93 *b*; Co. Litt. 49 *b*, 217 *a*). Now, although where lands were given to one for a term of years, and afterwards to another for life or in fee, the latter gift was said to be a gift in remainder, yet it was considered to be an immediate gift of the freehold. This was a consequence of the rule that the termor's possession does not interfere with the freeholder's seisin, and of the older doctrine

that the termor held as the freeholder's bailiff (Co. Litt. 15 a). In the case of such a gift, therefore, the enjoyment of the seisin was not regarded as being postponed by the term; so no question of repugnancy arose if the gift were perfected by immediate livery. This was necessary, as ever, but was properly made to the termor; and such livery vested an immediate estate of freehold in the so-called remainderman (Litt. s. 60; Co. Litt. 49 a; *Smith v. Packhurst*, *ubi supra*). Hence appears the necessity for a particular estate of *freehold* to support a contingent remainder of a like estate. For such a limitation, being in truth a gift to take effect on the future fulfilment of a condition precedent, can only be made, according to the common law, by way of remainder. And it cannot take effect if simply limited to come into possession on the expiration of a term of years, because that is equivalent in law to an immediate gift of the freehold, and an immediate gift to take effect on the future fulfilment of some condition would be a contradiction in terms, and therefore void (Co. Litt. 217 a). Again, a remainder, to be valid, must be limited to take effect in possession immediately on the regular determination of the particular estate. For, as we have seen, the ancient common law regarded the whole fee as passing away from the feoffor on a feoffment in fee; and it was considered that this took place none the less if various particular estates, as for life or in tail, were first limited by the feoffment, with remainder, on their determination in fee-simple, because all these estates were regarded as one for the purposes of the livery (Co. Litt. 49 b). But if any time were interposed between the end of the particular estate and the commencement of the remainder, as on a gift to A. for life and after his death and one day to B. in fee, the law, not admitting the idea of a vacancy of seisin, considered that on A.'s death the seisin must revert to the feoffor, and held that such seisin could only be again transferred from him by a new feoffment and livery. The remainder purported to be given to B. was therefore held equally void with the gift of a freehold in possession to commence at a future time (Plowd. 25 b). The effect of this rule in the case of a contingent remainder was that, if it were not ready to take effect when the particular estate ended, it would altogether fail; for if the remainderman were not then ready to take the seisin, it would revert to the grantor and continue with him, being only to be disposed of by a new feoffment and livery. This effect is usually stated in the proposition that every contingent remainder must vest during the continuance or at the instant of the expiration of the particular estate (Ferne, C. R. 307); which proposition is properly but a corollary of the first rule above given. Such is the rule of common law. An exception was made by the Contingent Remainders Act, 1877, with regard to every contingent remainder which has been created by an instrument executed or will republished on or after the 2nd August 1877, and which would have been valid if originally created as a shifting use or executory devise. Such a contingent remainder shall be capable of taking effect notwithstanding that the particular estate determine before the contingent remainder has vested.

Owing to the above-mentioned rule, a contingent remainder might fail at common law if it had not vested on the *regular* determination of the particular estate by any means. In the case of a contingent remainder to commence on the expiration of a life estate therefore, it might fail not only if not vested before the death of the life-tenant, but also if not vested before the determination of the life estate by forfeiture, merger, or surrender; for these were as regular modes of determination of a life estate as the tenant's death (Ferne, C. R. 16, 316 sq.). It was consequently

in the power of a tenant for life in possession by making a voluntary forfeiture, surrender, or merger of his life estate to destroy any contingent remainders limited to commence after his death. This was at first a great obstacle in the way of the permanence of the form of settlement on unborn sons, devised as before mentioned. It was obviated in the course of the seventeenth century by the introduction of an estate limited, after the determination of each life estate by forfeiture or otherwise in the tenant's lifetime, to trustees and their heirs during the remainder of his life on trust to preserve the contingent remainders (which, as we have seen, were usually to his unborn children successively in tail) from being defeated or destroyed. Such trustees' estate, being from the first capable of coming into possession on the regular determination of the preceding life estate, was vested; no act of the tenant for life could therefore prevent it from coming into possession, if his life estate ended in his lifetime; and if the trustees themselves put an end to their own estate, this was punishable as a breach of trust in equity (*Mansell v. Mansell*, 1732, 2 P. W. 678; *Smith v. Packhurst*, 1741, 3 Atk. 139). The necessity for the limitation in settlements of an estate to trustees, on trust to preserve contingent remainders, continued until it was enacted by the Real Property Act, 1845 (c. 106, s. 8), that a contingent remainder shall be capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold. Since then such limitations have been discontinued. It will be observed that this enactment introduced a limited exception to the common law rule above stated. We may notice here that if the particular tenant were disseised, any contingent remainders expectant on the determination of his estate would not be defeated, so long as he retained a right of entry on the land; but if his right of entry were taken away, and he were reduced to a right of action, it seems that the contingent remainders would be destroyed (Ferne, C. R. 286 and n. (e)).

A contingent remainder cannot be well limited to vest in an event which is illegal, either as being directly contrary to law or against public policy. Thus a remainder limited to vest on the commission of an indictable offence or an actionable wrong would be altogether void. So is a remainder to any child to be born out of wedlock. This rule is merely a particular instance of a principle applicable to contracts, and conditions and limitations generally (*Blodwell v. Edwards*, Cro. (1) 509; *Shep. Touch.* 128, 132; Ferne, C. R. 248, 249; *Egerton v. Brownlow*, 1853, 4 H. L. 1).

Mr. Ferne (C. R. 250) laid down a rule extracted from the Reports of Lord Coke (2 Rep. 51; 10 Rep. 50 b) that the contingency upon which a remainder is to vest must be a common possibility and not a double possibility, or a possibility on a possibility. As an example of an estate to arise on the latter kind of contingency, and void on that account, Lord Coke mentioned a gift in remainder to the heir of J. S., there being no such person as J. S. in existence at the time of the gift. But the authorities cited by Lord Coke do not support his conclusion; for it appears that such a gift is held void for uncertainty in the description of the person intended to take, and not because the estate is to arise in a double event (see Y. B. 2 Hen. VII. 13, pl. 16, per Keble; Bro. Abr. Done, 22). And Mr. Charles Butler pointed out (Ferne, C. R. 251, n. (e)) that Lord Coke's language cannot be taken literally, there being in truth nothing to limit the condition of a remainder vesting to the happening of one event only. And he instanced the unquestionable validity of a remainder to the first son of A. who shall attain twenty-one. Other eminent lawyers have also destructively criticised Lord Coke's and Mr. Ferne's proposition; and it is considered that, as a general principle,

it cannot now be seriously maintained (see 1 Prest. *Abst.* 128, 129; Williams on *Real Property*, 274-76, 13th ed.; J. C. Gray, *Rule against Perpetuities* (Boston, 1886), pp. 80-86, 135, 139, 140).

Let us now consider the rules applied to the creation of contingent remainders in order to establish the impossibility of keeping land in perpetual settlement, out of reach of the exercise of the power of alienation. These, as shaped at present, are singularly anomalous and are unintelligible apart from their history. The first step towards their comprehension is to bear in mind the history of the rule against perpetuities (*q.v.*) applied to the creation of executory interests (*q.v.*) arising by way of shifting use or executory devise. In 1681 it was adjudged that such interests could be well limited to arise within the compass of an existing life (*Howard v. Duke of Norfolk*, 3 Ch. Cas. 14). Then in 1718 it was held that they might be made take effect within a reasonable time after (*Marks v. Marks*, 10 Mod. Ca. 419). In 1736 this reasonable time was extended to the period of the minority of an infant actually entitled under the instrument by which the executory estate was conferred (*Stephens v. Stephens*, Ca. t. Talb. 228). It was settled in 1805 that any number of existing heirs might be taken (*Thellusson v. Woodford*, 8 R. R. 104). And it was not until 1833 that the rule was finally established in its present form, by which the time allowed after the duration of existing lives is a term of twenty-one years, independently of the minority of any person, whether entitled or not, with the possible addition of the period of gestation, but only where the gestation actually exists (*Cadell v. Palmer*, 7 Bli. N. S. 202). Now whilst this rule was in the making it seems to have been generally understood by conveyancers that in case of the limitation of two or more contingent remainders to take effect successively, the second or following remainder or remainders must be such as should necessarily vest within the compass of existing lives. For, as we have seen, the established practice in drawing settlements of land was to give life estates to the living, with remainder to their unborn children successively in tail; and it was not attempted in general to extend the time of settlement by limiting the lands to unborn children for life with remainder to their children in tail or otherwise. It will be observed that, so long as the life estates limited in a settlement are vested, any contingent remainder to take effect immediately thereafter must necessarily vest, at common law, within the compass of the life-tenant's existence, or it would fail as not having vested at the expiration of the particular estate. Where attempts were made to confer life estates on unborn generations successively according to the order of birth, the remainders limited after the life estates to the first unborn generation were held void, as contravening the general policy of the law against the settlement of land in perpetuity (*Humberston v. Humberston*, 1716, 1 P. W. 332; *Duke of Marlborough v. Godolphin*, 1759, 1 Eden, 404, 411, 415, 416; *Seaward v. Willock*, 1804, 5 East, 198, 205; *Beard v. Westcott*, 1813, 5 Taun. 393). The result of these decisions was summed up in the proposition that an estate given to an unborn person for life cannot be followed by any estate to any child of such unborn person, as the latter estate would be void (*Marlborough v. Godolphin*, 1 Eden, 415, 416; *Hay v. Coventry*, 1789, 1 R. R. 652; *Brudenell v. Elwes*, 1801, 6 R. R. 310). Now the reason of the decisions upon which this proposition is grounded seems to have been that, in such cases, the estate given to the child of the unborn would be void as tending to a perpetuity. In other words, the proposition, as originally formulated, was no more than a statement of a particular instance of the general rule against perpetuities. So it seems to have been considered by Mr. Fearn (C. R. 502). It was, however, suggested, in a

somewhat confused opinion of Mr. Booth (which he afterwards acknowledged to have been written when he was in the country and extremely engaged), that the possible children of unborn children are such as the law will not expect, and that the limitation of an estate to the child of an unborn person was void as being a possibility upon a possibility. The same suggestion was repeated in a subsequent opinion of Mr. Yorke upon the same case (2 Cases and Opinions, pub. 1791, pp. 435, 440). These opinions seem to have led Mr. Charles Butler to put forward the proposition in question as a rule existing independently of the general rule against perpetuities and as being an instance of the invalidity of a possibility on a possibility (Fearne, C. R. 565, *n.*). It is very strange that Mr. Butler should have so written; for in a previous note he had not only (as we have seen) subjected the supposed rule against double possibilities to the most destructive criticism, but had particularly demonstrated (citing *Routledge v. Dorril*, 2 R. R. 250) that the contingency of an unborn child having issue is unobjectionable on the score of its being a double possibility (Fearne, C. R. 251, *n.*). Mr. Jarman also cited the proposition in question as an independent common law rule founded on the invalidity of a double possibility (1 Jarm. *Wills*, 221, 1st ed.; see also *Sug. Pow.* 393, 394, 8th ed.). Mr. Preston, however, mentioned a remainder to the child of an unborn person, following a life estate to its parent, as an instance of an estate void for remoteness (2 *Prest. Abst.* 112, 148, 166, 168). Mr. Lewis (*Perpetuities*, 408 *sq.*) strongly argued that the proposition in question was merely an instance of the general rule against perpetuities. Mr. Joshua Williams, in stating the proposition in the first edition of his well-known treatise on *Real Property* (p. 212), allowed it to be an example only, not a rule, and mentioned the conflicting views as to the reason to be given for it, especially commending Mr. Lewis's argument. But in the third and subsequent editions of that work (pp. 227, 406, 3rd ed.; 276, 531, 13th ed.) he laid down the proposition as an independent rule derived from the doctrine against double possibilities, and he added an appendix in which he particularly combated the view Mr. Lewis had supported, maintaining that, if the proposition were no more than an instance of the rule against perpetuities, land might be tied up for at least a generation longer than was possible under the customary limitations of a settlement. It was not until 1889 that the Courts had to decide upon the validity of a remainder limited to the child of an unborn person, after a life estate given to the unborn parent. In *Whitby v. Mitchell*, 42 Ch. D. 494, 44 Ch. D. 85, it was held that such a remainder was void, notwithstanding that the gift in remainder had been expressly confined to such child of the unborn person as should be born within the compass of lives existing at the time of the gift. Kay, J., who decided the case in the first instance, was evidently much influenced by fear of extending the possible time of tying up land in settlement, and avowed himself contented to rest his judgment on the authority of Mr. Williams (who was then dead) as a real property lawyer. In the Court of Appeal the authority of Mr. Williams again prevailed, backed by that of Mr. Charles Butler, whose general observations on the alleged rule against double possibilities do not appear to have been cited. In this manner the rule that an estate cannot be well limited in remainder, after an estate given to an unborn person for life, to any child of such unborn person, was for the first time judicially pronounced to be a rule of law existing independently of the general rule against perpetuities. The rule so laid down is the second rule to be observed in the creation of contingent remainders.

This rule is modified, in the case of a gift by will, by what is called the

cy-près doctrine, according to which, if a testator devise lands to the unborn son of some living person for life, with remainder to such unborn son's sons in tail, the Courts will endeavour to carry out the testator's intention, as nearly as can possibly be done without infringing the rule which makes such a remainder void. In such cases therefore the unborn devisee is held to take an estate tail instead of a life estate only, the Courts doing what they can in the way of conferring an estate transmissible to the devisee's issue *in infinitum*, but being obliged to disregard the possibility of the entail being barred. The *cy-près* doctrine is only applied where the estates devised to the children of the unborn child are estates tail, and not where they are estates for life or in fee-simple (1 Jarm. *Wills*, 267-271, 5th ed.).

In the same year, 1889, however, a case occurred for which the above rules were insufficient to provide. It was therefore declared that in the limitation of successive contingent remainders, the second and subsequent remainders must be such as must necessarily vest within the period allowed by the general rule against perpetuities (*In re Frost*, 43 Ch. D. 246). This is the third rule to be observed in the creation of contingent remainders. An instance of it is the limitation of land to A., a bachelor, for life, and after his death to his first son for life, and after the son's death to A.'s eldest daughter who shall *then* be living. Here the contingent remainder to A.'s eldest daughter living at his son's death will be void, because it could not vest till the son's death, which might obviously occur more than twenty-one years after the death of A. This third rule, however, is subject to the proviso, that it shall not apply to the case of a contingent remainder limited to take effect on the termination of an estate tail originally limited as a contingent remainder; for in this case the latter remainder may be defeated by barring the entail; it does not therefore tend to tie up property beyond all power of alienation (*Nicolls v. Sheffield*, 1787, 2 Bro. C. C. 215; *Phillips v. Deakin*, 1813, 1 M. & S. 744; *Cole v. Scwell*, 1843, 2 Con. & Law. 344; 4 Dr. & War. 1; 2 H. L. 186). It is submitted that the second rule above mentioned does not prohibit the limitation in remainder, after an estate tail, of an estate to the child or remoter issue of some person unborn at the time of the gift.

Contingent remainders of trust estates were never subject to the rule of law requiring the remainder to vest before or upon the determination of the particular estate. As we have seen, this rule was a consequence of the common law's abhorrence of a vacancy of seisin. In the case of trust estates, however, the trustees were seised of the lands at law, so that there was no vacancy of the legal seisin, if, when a particular estate in the trust determined, a contingent remainder in the trust, limited to come into possession after that estate, had not vested. And equity did not follow the law in allowing the destruction of contingent remainders of trust estates, but rather obliged the trustees strictly to observe the intention of the creator of the trust (see *Chapman v. Blissett*, Ca. t. Talb. 145, 151; *Hopkins v. Hopkins*, *ibid.* 52, n.; *Astley v. Micklethwait*, 1880, 15 Ch. D. 59). Contingent remainders of trust estates must, however, be such as must necessarily vest within the period allowed by the general rule against perpetuities, or they will be altogether void (*Abbiss v. Burney*, 1881, 17 Ch. D. 211). But, so long as this condition be observed, they may well be limited to the child or remoter issue of an unborn person (*Thellusson v. Woodford*, *ubi supra*).

Contingent remainders of copyholds were never liable to destruction by the sudden determination of the particular estate; as in such case they

were said to be preserved by the freehold, which is in the lord. But they would fail, at common law, if not vested before or upon the natural expiration of the particular estates; and in other respects are subject to the same rules as contingent remainders of freehold estates at law (Fearne, C. R. 319, 320; 1 Scriv. *Cop.* 476-480, 3rd ed.).

At common law a contingent remainder limited to an ascertained person was regarded, not as an estate in the land, but as a *possibility* only of a future estate therein. It was therefore inalienable either by feoffment or deed of grant. It might, however, have been disposed of by fine acting by way of estoppel (Fearne, C. R. 365, 366), or released (10 Co. Rep. 48; 1 Str. 132); and it was devisable by will (*Jones v. Roe*, 1789, 1 R. R. 656), and assignable in equity (Fearne, C. R. 550, 551). But by the Real Property Act, 1845 (s. 6), a contingent interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed.

[*Authorities.*—Fearne on *Contingent Remainders*; Jarman on *Wills*; Williams on *Real Property*; Challis on *Real Property*; J. C. Gray, *Rule against Perpetuities*, Boston, 1886.]

Contingent Use.—A use limited to take effect in the future upon the happening of some uncertain event. See CONTINGENT REMAINDERS; EXECUTORY LIMITATION; SHIFTING USE; SPRINGING USE.

Continuing Act.—1. In those cases in which the law prescribes a period within which legal proceedings for an offence or an infraction of a civil right must be instituted, it is often necessary, for the purpose of ascertaining whether the remedy is statute-barred, to consider whether the act or default in respect of which it is claimed was completed at a given date or is a continuing act or an act repeated from time to time, so that the time for pursuing the remedy can be computed from the last day on which the act or default took place, and not from the day on which a complete offence was committed, or a right of action first accrued; that being the date from which a Statute of Limitation ordinarily runs.

2. Under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), the time limited for legal proceedings is six months next after the act, neglect, or default complained of, or in case of continuance of injury or damage six months after the ceasing thereof. This Act applies both to civil and criminal remedies against persons purporting to act under public or statutory authority.

With respect to indictable offences, the question of the continuousness of an offence rarely arises, there being no general, and few special, time limitations on prosecution by indictment. In the case of larceny, however, the question occasionally arises (with reference to the rules as to joinder of charges under 24 & 25 Vict. c. 96, s. 6) whether the taking is continuous so as to form one transaction (*R. v. Firth*, 1868, L. R. 1 C. C. R. 172; *R. v. Shepherd*, 1867, L. R. 1 C. C. R. 118). But in these cases continuity is considered from a different point of view from that taken with reference to limitation of proceedings.

Summary proceedings must, under sec. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), be instituted within six months of the time when the matter of the information or complaint arose, unless some

other time is prescribed by the Act, under which the remedy is given. As to the mode of computing the time, see *Radcliffe v. Bartholomew*, [1892] 1 Q. B. 161. This rule also applies to summary proceedings for an offence ordinarily triable on indictment. Civil debts recoverable by this procedure are treated in the same way as those dealt with by the Statutes of Limitations, i.e. failure to pay them when they have accrued is not regarded as a continuing default so as to extend the time for recovery (see *East London Waterworks v. Charles*, [1894] 2 Q. B. 730). It is impossible to enumerate all the acts or defaults which constitute continuing offences within this Act; but those most commonly to be considered are—(a) nuisances punishable summarily; (b) contravening regulations as to buildings (*London County Council v. Worley*, [1894] 2 Q. B. 826); (c) disobedience to orders of Courts of summary jurisdiction (*R. v. Slade*, [1895] 2 Q. B. 247); (d) desertion by a husband of his wife (*Wilkinson v. Wilkinson*, 1894, 58 J. P. 415; *Heard v. Heard*, [1896] Prob. 188). Persistent cruelty to, and wilful neglect of, a wife are held not to be continuing acts (*Ellis v. Ellis*, [1896] Prob. 251). The effect of proof that the offence is continuing is merely to defeat any objection that the time for prosecution runs from its first commission. It does not entitle the prosecutor to go, except, perhaps, for purposes of evidence, behind the period of limitation, nor to recover penalties for more than six months prior to the institution of the proceedings (*R. v. Slade, ubi supra*). In the case of cruelty to children specific provision is made (57 & 58 Vict. c. 41, s. 18) for giving such evidence in the case of continuous cruelty extending outside the period of limitation.

In cases not covered by the statutes already referred to, it is material for the purposes of civil proceedings to inquire whether an act or cause of action is continuing in order to determine (a) whether the remedy is statute-barred, (b) the mode of assessing the damages sustained and to be awarded.

(a) In cases of private nuisance, continuance of the nuisance is the ground for proceedings for injunction; and the fact that such a nuisance is continuous prevents the complete operation of the Statutes of Limitations; but, on the other hand, laches in enforcing the remedies available, or acquiescence in the nuisance may, if persisted in, be taken as evidence of a prescriptive right to do what is complained of. Where the right of support by subsoil is infringed by excavations, the right of action accrues at the date, not of the excavations, but of the consequent damage, and a separate right of action accrues with each particular damage by loss of support (*Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503). In this case, where the injury is continuous or successive, the injured person is not required nor entitled to sue until the damage is sustained, and the statutes do not run till then.

(b) Where a cause of action is continuing, the damages are to be assessed down to the date when the assessment takes place (*R. S. C.*, 1883, Order 36, r. 58; *Hole v. Chard Union*, [1893] 1 Ch. 293). This rule has been established to avoid multiplicity of action, but does not in strictness affect the right to bring separate actions for the successive injuries.

Contra Formam Statuti.—1. In an indictment for an offence created or regulated by statute, it was at common law necessary to recite the statute, to describe the offence in its terms, and to conclude with the words, “against the form of the statute (or statutes) in that case made and provided, and against the peace, etc.” The reason for not

specifying the particular statute or statutes seems to have been to avoid the risk of error in describing the statute, or in selecting the statute to be referred to. But the words, *contra formam*, etc., while essential, did not avail to cure want of precision or certainty in the description of the offence charged (2 Hale, P. C. 170).

The law on this subject has been altered by modern legislation. Where an offence is created or its punishment increased by the statute, description of the offence in the words of the Act is sufficient after verdict, *i.e.* is not ground for a writ of error (7 Geo. IV. c. 64, s. 21). And under 14 & 15 Vict. c. 100, s. 24, it is now immaterial whether against the form "of the statute" or "of the statutes" is inserted in the indictment. This provision does not obviate the necessity of inserting one or the other; but their omission is cured by the provision in the same sec. (24) that an indictment shall not be insufficient for want of a proper and formal conclusion (see *Castro v. R.*, 1881, 6 App. Cas. 229). The *dicta* to the contrary in *R. v. Mayor, etc., of Poole*, 1886, 19 Q. B. D. 602, are inconsistent with the House of Lords case, and seem to have been uttered *per incuriam* (see 19 Q. B. D. 683, *n.*).

The practice of pleaders to insert the formal conclusion continues from inveterate custom or caution unaffected by either statute or case law.

2. In pleadings in civil actions even on penal statutes, this formal conclusion is no longer necessary. As to the old practice, see *Com. Dig. tit. "Action on Statute"* (9) (H. 1).

[*Authorities.*—Archbold, *Cr. Pl.*, 21st ed., 69, 76; Russ. on *Crimes*, 6th ed., vol. i. p. 37.]

Contraband.—See SMUGGLING.

Contraband of War.—By the law of nations, neutrals in time of war are forbidden to give material help to either belligerent. Generally speaking, any articles supplied by a neutral for the purpose of giving such help are contraband of war.

"There are still disputes," says Grotius, "as to what may lawfully be done to those who are not our enemies, nor are willing to be thought so, and yet furnish our enemies with supplies. This is a point which has been sharply contested, both in ancient and modern times, some maintaining the extreme right of war, others the freedom of commerce. In the first place, we must distinguish between the things themselves; for there are some things which are of use only in war, as arms; others which are of no use in war, but serve only for pleasure; others which are useful both in war and peace, as money, provisions, ships, and their appurtenances."

He agrees with the prohibition of neutrals from carrying to the enemy articles of the first kind, and in permitting traffic in articles of the second kind. As regards articles of the third kind, those which are of use, both in time of war and in time of peace (*usus ancipitis*), we must distinguish according to the circumstances; "for if I cannot protect myself unless I intercept what is sent, necessity will give me a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. But if the supplying of the articles will impede the execution of my design, and he who transports them might have known this fact—as, for instance, if I am besieging a town or blockading a port, and a surrender

or a peace is daily expected—he will be liable to me for damages, and his property may be taken to satisfy them. If he has not done the damage, but is only attempting to do it, his property may be detained until he gives security for the future; but if the injustice of my enemy be very clear, and the supplies conveyed to him support him in his unjust war, then shall the party who conveys them to my enemy be not only liable to repair my loss, but he may be treated as a criminal, as one who is rescuing a notorious offender from impending judgment; and for this reason it will be lawful for me to deal with him according to his offence, and for the purpose of punishment I may deprive him of his merchandise” (*De Jure Belli et Pacis*, lib. iii. c. 1, s. 5).

The rules of international law relating to contraband are, on the whole, still in accordance with the distinctions of Grotius.

The first kind in Grotius’ distinction are usually called “absolute contraband,” the third “conditional contraband.”

The British Admiralty Manual of Prize Law, 1888, enumerates as *absolutely contraband*: Arms of all kinds and machinery for manufacturing arms; ammunition, and materials for ammunition, including lead, sulphate of potash, muriate of potash, chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpetre and brimstone, also gun-cotton; military equipments and clothing; military stores; naval stores, such as masts, spars, rudders, and ship timber, hemp and cordage, sailcloth, pitch and tar, copper fit for sheathing vessels, marine engines, and the component parts thereof, including screw-propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates and fire bars, marine cement and the materials used in the manufacture thereof, as blue lias and Portland cements, iron in any of the following forms—anchors, rivet iron, angle iron, round bars of iron of from $\frac{3}{4}$ to $\frac{5}{8}$ of an inch diameter, rivets, strips of iron, sheets, plate iron exceeding $\frac{1}{4}$ of an inch, and Low Moor and Bowling plates; and as *conditionally contraband*: provisions and liquors fit for the consumption of army or navy; money; telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the construction of a railway, as iron bars, sleepers, etc.; coals; hay; horses; rosin; tallow; timber.

England, consistently with the above distinction, during the war of 1870, considered that the character of coal should be determined by its destination, and vessels were prohibited from sailing from British ports with supplies directly consigned to the French fleet in the North Sea (see Hall, *Inter. Law*, p. 686).

At the West African Conference of 1884, Russia declared that she would “categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply” the recognition of coal as contraband of war (Parl. Papers, Africa, No. iv. 1885).

The Prussian *Prisenreglement* of June 20, 1864 (see Art. 8), the Austrian *Ministerialverordnungen*, of March 3, 1864 (see § 7) and of July 9, 1866 (see § 4), define contraband, the former as “all things which may be employed directly (*unmittelbar*) for the war”; the latter adds the exception of such reasonable provision of prohibited articles as may be necessary for the ship’s protection.

There has been much controversy respecting what articles should be considered as provisional contraband (*contrebande relative ou par destination*). An idea of the prevalent uncertainty may be gathered from the fact that Germany in three commerce and navigation treaties with States similarly situated—San Salvador, Mexico, and Costa Rica—between 1869

and 1875, pledged herself to three different lists of prohibited articles! (Perels, *Droit Maritime*, Paris, 1884, p. 274).

The treatment of food-stuffs as an article of contraband is about the extreme limit in the classification.

During the wars of the French Revolution the British Government claimed to treat as contraband even provisions which might *indirectly* serve to prolong war, but this was not a ruling of the judges.

On this subject Sir W. Scott in *The Jonge Margaretha* case (1799, 1 Rob. C. 193) made the following observations and distinctions:—

The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. In much later times many other sorts of provisions were condemned as contraband. In 1747, in *The Jonge Andreas*, butter going to Rochelle was condemned; how it happened that cheese at the same time was more favourably considered (according to the case cited by Dr. Swabey) is not known. "In all probability the cheeses were not of the species which is intended for ship's use." Salted cod and salmon were condemned in *The Jonge Frederick*, going to Rochelle in the same year. In 1748, in *The Joannes*, rice and salted herrings were condemned as contraband. These instances show that ordinary articles of human food have been considered contraband, "at least *where it was probable* that they were intended for naval or military use."

The subject of food-stuffs as contraband was revived in 1885, when in the course of the French hostilities against China the French Government announced that it intended to treat as contraband all shipments of rice destined for the open ports north of Canton. M. Ferry, in a despatch on the subject, stated that the French Government had received information that large quantities of rice were being forwarded to the northern ports of China, and that the stoppage of these would materially influence the Peking Government. The English Ambassador in China refused to recognise any such right of stoppage, but his Government stated that though it would not resist the seizure of rice by physical force, its legality must be determined by the French Prize Courts, subject to ulterior diplomatic action. The preliminaries of peace, however, were settled before any shipments were seized.

"Detention of provisions," says Mr. Hall, "is almost always unjustifiable, simply because no certainty can be arrived at as to the use which will be made of them; so soon as certainty is in fact established, they and everything else, which directly and to an important degree contributes to make an armed force mobile, become rightly liable to seizure. They are not less noxious than arms; but, except in a particular juncture of circumstances, their noxiousness cannot be proved" (*Inter. Law*, p. 689).

It is usual at the outbreak of war to issue instructions indicating the articles which will be considered as contraband, and this furnishes neutrals with an opportunity of protesting, if need be, against the inclusion of any articles the prohibition of which would be unjustifiably detrimental to their trade.

Apart from contraband properly speaking, but usually classed with it

analogically is the transport of despatches relating to the war and of persons connected with its conduct in the service of a belligerent. These are called *analogues of contraband* (*contrebande accidentelle*).

The carriage of war despatches gives rise to little difficulty, and the neutral is bound in respect to them by the rules relating to contraband. As regards persons, the following distinction under the circumstances of contemporary international traffic is probably the only workable one:—"If a vessel," says Mr. Hall, "is so hired by a belligerent that he has entire control over it to the extent of his special needs, the ship itself is confiscable as having acquired an enemy character, and the persons on board become prisoners of war. If, on the other hand, belligerent persons, whatever their quality, go on board a neutral vessel as simple passengers to the place whither she is in any case bound, the ship remains neutral, and covers the persons on board with the protection of her neutral character" (*Inter. Law*, p. 708).

The penalty under the law of nations for carrying contraband articles is confiscation of the ship, though in later times this practice has been relaxed. Where the owners of the ship and contraband cargo are different persons, the ship is allowed to go free, subject to the forfeiture of freight and to expenses on the part of the neutral owner (*ibid.*; *The Mercurius*, 1798, 1 Rob. C. 80, 85).

Sir William Scott, who decided many cases according to the newer practice, considered that the older one was, nevertheless, perfectly defensible on every principle of justice, inasmuch as "if the supplying the enemy with articles of contraband is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent" (3 Rob. C. 295).

The ground upon which the relaxation was introduced seems to have been that noxious or doubtful articles might have been taken on board without the personal knowledge of the owner (3 Rob. C. 297). A neutral master, however, will not be allowed to aver ignorance of the contents of his cargo (*The Oster Risør*, 1802, 4 Rob. C. 199). Nor do the relaxations apply to cases attended with aggravating circumstances, as where the vessel is taken on her way to a hostile port with a false destination (*The Franklin*, 1801, 3 Rob. C. 217; *The Edward*, 1801, 4 Rob. C. 68; *The Ranger*, 1805, 6 Rob. C. 125; *The Eliza Holtz*, 1794, cited 1 Rob. C. 91).

"It is universally admitted that the offence of transporting contraband goods is complete, and that the penalty of confiscation attaches from the moment of quitting port on a belligerent destination; and a destination is taken to be belligerent if it is not clearly friendly; a vessel is not permitted to leave her course open to circumstances, and to make her destination dependent on contingencies. If in any contingency she may touch at a hostile port, she is regarded as liable to capture; she can only save herself by proving that the contingent intention has been definitely abandoned" (Hall, *Inter. Law*, p. 694; *The Imina*, 1800, 3 Rob. C. 167; *Trende Sostre* cited in *The Lisette*, 1806, 6 Rob. C. 390 n.).

In the case of *The William* (1806, 5 Rob. C. 385), a neutral ship, a cargo was taken on board at La Guayra, brought to Marblehead in Massachusetts, landed and re-embarked there in the same vessel, with the addition of some sugar from the Havannah, and within a week of its arrival was despatched to Bilbao. The English Court condemned the property in accordance with what was called by Lord Stowell, the *doctrine of continuous voyages*.

During the American civil war this doctrine was applied by the American Courts in the case of vessels captured while on their voyage from one neutral port to another, which were condemned, as Mr. Hall words it, "on mere suspicion of an intention to do an act." "Between the grounds upon which these and the English cases were decided there was ... no analogy" (*Inter. Law*, p. 695).

For the English view, besides the case of *The William*, above cited, see *The Maria*, 1805, 5 Rob. C. 365, and the cases reviewed therein; for the American decisions, see *The Bermuda*, 1865, 3 Wallace, 514, and *The Springbok*, 1866, 5 Wallace, 1). See Twiss, *La Théorie de la Continuité du Voyage*, Paris, 1877.

A view similar to the American one, as laid down in the case of the *Springbok*, was taken by the Italian Court in the recent one of the *Doelwijk*, a Dutch vessel captured and declared good prize, on the ground that though bound for the French colonial port of Djibouti, it was laden with "an extraordinary provision of arms of a model out of use," which could only be intended for the Abyssinians with whom the Italians were at war (see Brusa, *Rev. gin. de droit International Public*, 1897; Fanchille, *id.* 1897, p. 291; Fedozzi, *Rev. de droit International et de législation comparée*, 1897, p. 55; Diena, *Journal du droit internat. privé*, 1897, p. 268).

See also *Ruys v. The Royal Exchange Assurance Corporation* on some issues arising out of the confiscation of the *Doelwijk*, *The Times*, April, 15, May 25, and June 1, 1897.

We have seen that every article of contraband, by the law of nations, is liable to confiscation; a distinction, however, is made in favour of articles conditionally so. These are subject to pre-emption only.

27 & 28 Vict. c. 25, s. 38, provides as follows:—

"Where a ship of a foreign nation passing the seas laden with naval or victualling stores intended to be carried to a port of any enemy of Her Majesty, is taken and brought into a port of the United Kingdom, and the purchase, for the service of Her Majesty, of the stores on board the ship appears to the Lords of the Admiralty expedient without the condemnation thereof in a Prize Court, in that case the Lords of the Admiralty may purchase on the account or for the service of Her Majesty, all or any of the stores on board the ship; and the Commissioners of Customs may permit the stores purchased to be entered and landed within any port."

The English practice is to purchase at the market value with a reasonable majoration, usually 10 per cent., for profit.

In the domain of theory there are two distinct tendencies. Jurists belonging to maritime Powers, jealous of their belligerent rights, tend to sustain the existing uncertainty. Those who belong to the weaker and neutral States would restrict contraband to a limited number of articles. In the recent discussions of the INSTITUTE OF INTERNATIONAL LAW (*q.v.*) these conflicting tendencies were made visible, and the decisions adopted are, to some extent, a compromise between them (see *Annuaire de l'Institut de Droit International*, 1896, p. 231).

[*Authorities.*—Hall, *International Law*, 5th ed., 1895; Rivier, *Principes du Droit des gens*, Paris, 1896; Twiss, *Law of Nations in Time of War*, 2nd ed., 1875; Perels, *Droit Maritime International*; traduit par Arendt, Paris, 1884; Hautefeuille, *Des droits et devoirs des nations neutres*, 2nd ed., 1858; Geffcken, in Holtzendorff's *Handbuch*, 1889, vol. iv. pp. 545 *et seq.*]

Contract.

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The purpose of this article is to give a summary view of the principles established in our modern law, but not to enter into historical explanation, to discuss speculative or controverted points, or to set forth such rules of detail as are important only in the special branches of the subject. References are necessarily limited to authorities which have settled the law, or are specially familiar or useful as illustrations, and a few of the more recent decisions.

1. *Promise*.—Every promise enforceable by law is a contract, and all contracts are regarded in the modern Common Law as founded on promises express or implied, that is to say, either framed in words or inferred from the promisor's acts or conduct. The obligation of contract is distinguished from other kinds of obligation in this, that its contents are wholly determined by the ascertained will of the parties. The law may restrain the effect of a promise for paramount reasons of convenience, but it will impose nothing that is not contained in the promise, or by construction of law deemed so to be. Rules of interpretation may supplement imperfect expression; in some classes of cases this process has been carried very far; nevertheless every such rule is only a guide to be followed where actual proof of the parties' intention is wanting.

When a promise has been accepted as binding by the person to whom it is made, there is an agreement. It is a convenient usage, though not yet universally recognised, to apply the term "contract" only to such agreements as the law will enforce.

There is one way in which there may be a binding contract without any agreement. A promise unconditionally made by deed is irrevocable even before the promisee knows of it, although the promisee, when he does know, may accept it or not at his will. The ground of this would seem to be that the promisor's declaration that he is bound, being made in the solemn form of a deed, is, in the absence of fraud or other special cause of invalidity, conclusive against himself (*Doe d. Garbons v. Knight*, 1826, 5 Barn. & Cress. 671; 29 R. R. 355; *Xenos v. Wickham*, 1866-67, L. R. 2 H. L. 296). In several American jurisdictions this rule, which is deduced from the historical qualities of a deed, is rejected as inconvenient.

2. *Offer and Acceptance*.—Apart from this exceptional case, a promise is formed by the acceptance of an offer. What is called a promise in common speech is in law no more than an offer or proposal until it is accepted. So that, before we can say that an agreement is formed, we must generally be satisfied—

- (1) That an offer was made;
- (2) That it was taken, and reasonably taken, as the offer of a contract (not of a merely moral, social, or honorary obligation; this question does not often arise, but the possibility of it must not be overlooked);
- (3) That the offer, being open for acceptance, was accepted as it was made, and by a person to whom it was made.

Offer, acceptance, or both, may be made expressly by words, or tacitly by appropriate acts; as when we hail a cab, or step into a ferry-boat, or a tradesman despatches goods in answer to an order. There need not even be direct communication between the parties. Entering for a yacht race and undertaking, to the knowledge of others who enter, to be bound by the rules, is enough to form a mutual agreement between all who enter to observe the rules and accept any liability imposed by them (*The Satanita*, [1897] App. Cas. 59).

An offer to be bound on one side, and willingness to hold the proposer bound on the other, do not alone form a binding contract. A promise, unless formally made by deed or by matter of record, binds only if exchanged for a *consideration*, which may consist in a performance or a counter-promise, or both. More will be said of this below. The rules as to offer and acceptance are intimately connected with the principle, which therefore has to be now mentioned.

In the majority of ordinary cases the questions arising under these heads are questions of fact. But questions may arise on the interpretation of offer, acceptance, or both; and some difficulties can be provided for only by laying down positive artificial rules. The following are the chief points to be observed:—

(1) The terms of an alleged promise must be certain; for the Court must know what it is to enforce (*Taylor v. Brewer*, 1813, 1 M. & S. 290; 21 R. R. 831; *Pearce v. Watts*, 1875, L. R. 20 Eq. 492).

(2) The promise must be definitive. A final acceptance of terms has to be distinguished from a preliminary acceptance of terms as the basis for a more formal agreement which alone is to be binding. Reference to a proposed more formal document is strong but not conclusive to show that agreement is not complete (*Rossiter v. Miller*, 1878, 3 App. Cas. 1124; *Winn v. Bull*, 1877, 7 Ch. D. 29); recent illustrations either way (*Lloyd v. Nowell*, [1895] 2 Ch. 744; *Filby v. Hounsell*, [1896] 2 Ch. 737). An acceptance of all the terms proposed may be expressly and effectually guarded from being a final acceptance, as where it provides that the contract shall not be complete until some further act is done (*Canning v. Farquhar*, 1886, 16 Q. B. D. 727).

Documents which standing alone would form a complete contract may be shown by consideration of all the circumstances not to be final (*Hussey v. Horne-Payne*, 1879, 4 App. Cas. 311); and parties who have proposed and discussed fresh terms after an apparently complete agreement cannot afterwards fall back upon the original terms (*Bristol, etc., Bread Co. v. Maggs*, 1890, 44 Ch. D. 616; explained per North, J., in *Bellamy v. Debenham*, 1890, 45 Ch. D. 481, 493–495).

(3) The acceptance must not vary from the offer. It may not impose a new term or variation on the proposer by saying that the acceptor assumes his consent thereto unless otherwise informed (*Felthouse v. Bindley*, 1862, 11 C. B. N. S. 869). If the proposer has prescribed a time or place for receiving the acceptance, those terms must be observed as much as any others (*Eliason v. Henshaw*, Sup. Ct. U.S., 4 Wheaton, 225). An intended acceptance with a variation may be taken as a fresh offer, but can be nothing more.

(4) Questions of some difficulty arise when special conditions are attached to a form used in a common way of doing business with the public. Examples are afforded by steamship and railway tickets, cloak-room tickets or other receipts for goods deposited, telegraph companies' forms, and the like, which constantly bear or refer to conditions restricting

the framer's liability on the contract undertaken. If a person whom it is sought to bind by such conditions denies that he knew or agreed to them, the result of the authorities is that it is a question of fact whether the party relying on the conditions took reasonable means to communicate them to the other as being the terms on which alone he was willing to undertake the business (*Henderson v. Stevenson*, 1875, L. R. 2 Sc. & D. 470; *Watkins v. Rymill*, 1883, 10 Q. B. D. 178). All the circumstances, including the class of persons for whom the notice is meant, should be considered (*Richardson v. Rowntree*, [1894] App. Cas. 217). Stricter proof of knowledge would no doubt be required in fact, if not as a rule of law, in any case where the conditions were of an unusual kind.

(5) An offer need not be addressed to a certain person in the first instance. It may be addressed to any person, or to the first person, who will comply with its terms. The common example is that of a reward offered by public advertisement. A case commonly cited (*Williams v. Carwardine*, 1833, 4 Barn. & Adol. 621) seems at first sight to hold it immaterial whether the person satisfying the condition and claiming the reward knew of and acted on the offer or not; but this is clearly contrary to principle (*Fitch v. Snedaker*, 38 N. Y. 248; and see Hawkins, J., note on *Williams v. Carwardine* in *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. at p. 489).

Contracts of this class may also arise in commercial affairs, as by negotiating bills on the faith of an open letter of credit (*In re Agra and Masterman's Bank*, 1867, L. R. 2 Ch. 391).

Offers of this kind are sufficiently accepted by performing their conditions, and they may be conditional on a further event beyond the party's control. The makers of a remedy and prophylactic against influenza, having offered £100 to anyone who caught influenza while using the remedy, were held liable on the happening of this event, notwithstanding that the promisors had reserved no means of checking the performance of the condition, and might become liable to an indefinite number of persons; for that was their own self-imposed risk (*Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A., where the principles governing these cases are well discussed). See under the head of *Consideration*, *infra*, p. 339, as to the effect of that doctrine in this connection.

General offers capable of becoming promises by the performance of their terms must be distinguished from announcements which only invite business and are not intended to define the terms of a contract. An advertisement offering goods for sale by tender does not imply the offer of a contract to sell to the highest bidder (*Spencer v. Harding*, 1870, L. R. 5 C. P. 561). An auctioneer's advertisement of a sale cannot be treated as an actionable promise by an intending buyer who comes to the sale, and finds the goods he wanted to buy withdrawn (*Harris v. Nickerson*, 1873, L. R. 8 Q. B. 286). At an ordinary sale by auction, the first step to the formation of a contract is the actual bidding, in which every bid is an offer; the bid which is accepted by the fall of the hammer becomes a promise to take the lot for the price named (*Payne v. Cave*, 1789, 3 T. R. 148; 1 R. R. 679). *Warlow v. Harrison*, 1859, 1 El. & El. 295, is a peculiar case. A railway time-table has been held an offer to the public, which becomes a promise to an intending passenger tendering his fare for a particular advertised train (*Denton v. G. N. Ry. Co.*, 1856, 5 El. & Bl. 860, *sed qu.*).

Offer how long open.—An offer can be withdrawn by notice at any time before acceptance. It must be accepted within a reasonable time, according to the nature of the case, or, if the proposer has specified any time, then

within that time. Such specification, even if expressed as a promise to keep the offer open, is only a warning to the acceptor, and does not restrain the proposer (*Offord v. Davies*, 1862, 12 C. B. N. S. 748). One who has received an offer is entitled to actual notice of revocation before he has completed any act of acceptance; such notice cannot be made to relate back to the date of its despatch (*Byrne v. Van Tienhoven*, 1880, 5 C. P. D. 344; *Stevenson v. McLean*, 1880, 5 Q. B. D. 346). Action by the proposer manifestly inconsistent with adherence to his proposal, and known to the other party, though not expressly made known to him by the proposer, may be sufficient notice (*Dickinson v. Dodds*, 1876, 2 Ch. D. 463, precise extent and authority of decision doubtful).

Acceptance when complete; Contracts by Correspondence.—Acceptance consists in acting on the proposer's request. In the common case of the thing immediately required being a promise, the acceptor must communicate his promise (for a promise not communicated is naught) by such means as the proposer has authorised, or (in the absence of express authority) by any reasonable and usual means deemed to be within the contemplation of the parties, i.e. generally by post or telegraph (*Henthorn v. Fraser*, [1892] 2 Ch. 27, C. A.). An acceptance by post, authorised in this sense, is binding on the proposer from the date of posting, notwithstanding delay in delivery due to the proposer's own act (*Adams v. Lindsell*, 1818, 1 Barn. & Ald. 681; 19 R. R. 415), or to accident (*Dunlop v. Higgins*, 1848, 1 H. L. 381), or even if, without the acceptor's fault, it is not delivered at all (*Household Fire Insurance Co. v. Grant*, 1879, 4 Ex. D. 216). It should seem that a letter, telegram, or special message despatched after an authorised acceptance for the purpose of revoking it, and arriving with or before it, would be inoperative. This point is undecided. Such revocation has been held effectual in Scotland (*Dunmore v. Alexander*, 1830, 9 S. & D. 190).

The question of contracts between absent parties has been much discussed in other systems, and is variously dealt with by legislation and learned opinion on the Continent. See Valéry, *Des contrats par correspondance*, Paris, 1895 (the learned author's conclusions as to acceptance are much like those of our own latest authorities); German Civil Code, ss. 147–151.

Where the thing requested by an offer is not a promise but an act, and the acceptor is not expressly required by the proposer to communicate his acceptance further or otherwise than by doing that act, and there is no sufficient reason to consider any such request as embodied in the nature of the transaction by custom or obvious convenience, it does not seem that communication of the acceptance is necessary. Sometimes it is not possible; consider the case of obtaining a box of matches from an automatic machine, where putting in the proper coin is the acceptance of the standing offer made by the owner of the machine to the public. Some authorities prefer to say that communication is generally necessary, but in these cases the proposer is taken to have dispensed with it (*Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. at pp. 262, 263, 269).

3. *Form of Contract.*—Apart from the so-called contracts of record (recognisances, etc.), which are outside the general law of contract, contracts under seal are the only class operative by force of their form alone. Any kind of contract may be made by deed; in modern practice bonds (frequent, but used for a limited set of purposes, and seldom giving rise to any question), covenants expressed or implied in conveyances, and partnership articles, are those which chiefly occur between natural persons. A corporation con-

stantly does, and in some cases must, contract under its common seal (see under the subdivision *Capacity of Parties, infra*, p. 342).

By the law merchant, now embodied in the Bills of Exchange Act, 1882, and equivalent statutes in some colonies, negotiable instruments have to satisfy conditions of form. The common law has not gone the whole length of treating them as formal contracts, though perhaps it ought to have done so.

Writing or signature is required by statute in divers particular cases. It will here be sufficient to mention the Statute of Frauds (29 Car. II. c. 3) (see the title FRAUDS, STATUTE OF, for details as to the construction and effect of its provisions as to the several kinds of contracts within sec. 4, and SALE OF GOODS as to sec. 17; note that sec. 17 is in England superseded and re-enacted by the Sale of Goods Act, 1893, s. 4). The substance of this statute is believed to be in force by enactment or adoption in all common law jurisdictions, except so far as it applied in British India, where it was repealed by the Contract Act. Points of general application to cases within the statute are these—

The signature of "the party to be charged," or his agent, is required only as evidence of the agreement. It need not be a signature of the contract as such; and a signature may, by subsequent oral assent, even be made to cover alterations in the body of the writing (*Stewart v. Eddowes*, 1874, L. R. 9 C. P. 311). The plaintiff need not have signed (*Laythorpe v. Bryant*, 1836, 2 Bing. N. C. 735); and parol acceptance of a signed proposal is good to bind the proposer (*Reuss v. Picklesley*, 1866, in Ex. Ch. L. R. 1 Ex. 342). Even a signed writing purporting to repudiate the agreement may be a sufficient memorandum to bind the party signing it (*Bailey v. Sweeting*, 1861, 9 C. B. N. S. 843).

The "memorandum" or "note" to which the signature applies must show with sufficient certainty, by name or specific reference, the parties to the contract and the subject-matter (*Shardlow v. Cotterell*, 1881, 20 Ch. D. 90). But for this purpose two or more documents may be read together, if sufficiently connected on the face of them. Parol evidence is admitted to show that one document is the document (say a letter of a certain date) referred to in another (*Oliver v. Hunting*, 1890, 44 Ch. D. 205), or that two papers were in fact so connected as to make one document according to common understanding, as that a letter not showing the name of the addressee was the letter contained in an addressed envelope (*Pearce v. Gardner*, [1897] 1 Q. B. 688, C. A.).

An agreement which fails to comply with the Statute of Frauds is not void, but only incapable of being enforced by action. This was settled as regards sec. 4, and (after much discussion) the accepted opinion as regards sec. 17; the language of sec. 4 of the Sale of Goods Act, 1893, removes any doubt.

The statute is understood not to apply to contracts under seal (*Cherry v. Heming*, 1849, 4 Ex. Rep. 631). In modern practice, however, deeds are always signed.

4. *Consideration*.—An informal promise is not binding unless given in exchange for a *consideration* which the law can regard as of some value. The consideration may be (a) a present act or forbearance, when it is said to be *executed*, or (b) a promise either to do or forbear, when it is said to be *executory*. It is always given in exchange for a promise. For if simultaneous acts are exchanged without any preceding obligation (as when goods of known fixed price are bought for cash over the counter) there may be agreement in a wide sense, but there

is no contract binding either party for any assignable time; and if performance is given on one side without any reciprocal promise, the elements of a contract are equally wanting, subject to exceptions rather apparent than real. It has been laid down that "a valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (*Currie v. Misa*, 1875, L. R. 10 Ex. 162). But since the benefit to the promisor, if any, must be furnished by, or in the accustomed phrase "move from" the promisee, at the cost of, at least, some trouble or responsibility, the essence of consideration seems reducible to detriment to the promisee (*Langdell, Summary*, s. 64).

Promises may be, and constantly are, the considerations for one another; this happens in all transactions where there is mutual credit. In all such cases the contract and the consideration are complete by the exchange of promises, and subsequent performance by either party is no part of the consideration, though fulfilment or failure may be a material condition of further legal results.

Consideration is that which is actually given and accepted in return for the promise. The party suing on a promise has to show this, and need not show more; ulterior motives or purposes are indifferent (*Thomas v. Thomas*, 1842, 2 Q. B. 851).

Provided that the consideration is such as the law can deem to be of some value, however small, it is enough to support the promise; the estimation of its adequateness is left to the parties, for "the value of all things contracted for is measured by the appetite of the contractors" (Hobbes). For the same reason there need not be any obvious benefit to the promisor. Examples: parting with the possession of goods (*Bainbridge v. Firmstone*, 1838, 3 Ad. & E. 743); with a document supposed valuable, whether really of the value supposed or not (*Haigh v. Brooks*, 1839-40, Q. B. & Ex. Ch. 10 Ad. & E. 309, 323); determination of one's lawful choice in a particular way, as by supporting a particular candidate for a charity where there is no duty to ascertain or vote for the most deserving (*Bolton v. Madden*, 1873, L. R. 9 Q. B. 55). The same rule holds in the exceptional cases where consideration is required for a promise made by deed (*Gravelly v. Barnard*, 1874, L. R. 18 Eq. 518). Gross inadequacy of consideration may, however, be material as evidence of fraud.

A promise dependent on a contingency within the promisor's own control is not an inadequate consideration, but no consideration at all. A tender by P. to supply R. with all the iron he may order at a certain price is a standing offer which, while open, R. can accept from time to time by ordering iron of P. But a general assent to this offer by R. is inoperative, because it binds R. to nothing (*G. N. Ry. Co. v. Witham*, 1873, L. R. 9 C. P. 16; *R. R. Co. v. Dane*, 1873, 43 N. Y. 240).

Forbearance and Compromise as Consideration.—When forbearance to sue is the consideration for a promise, there must be a definite claim which is possible on the face of it. Forbearance to sue for an alleged debt from a deceased person, without showing that the defendant, or anyone, might have been sued as his representative, will not do (*Jones v. Ashburnham*, 1804, 4 East, 455). Where there is any serious claim honestly made, compromise or forbearance of it is good consideration (*Miles v. New Zealand Alford Estate Co.*, 1885-86, 32 Ch. D. 266, where authorities are reviewed). And the forbearance need not be for any definite time; it may be taken to be for a reasonable time according to the facts of the case (*Oldershaw v. King*, 1857, 2 H. & N. 517).

Considerations insufficient in Law.—The consideration must “move from the plaintiff,” and a stranger to the consideration cannot be empowered to sue on a contract, even by the express consent of the real contracting parties, nor is the rule modified, as once supposed, by the relation of parent and child between the actual promisee and the person for whose benefit the promise is made (*Tweddle v. Atkinson*, 1861, 1 B. & S. 393). But in most American jurisdictions there are exceptions of varying extent to this rule (Harriman, *Elements of the Law of Contracts*, pp. 217–228). As to a supposed exception in favour of children under a marriage settlement, see *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341, 349.

The existence of a moral duty from the defendant to the plaintiff is no legal consideration for a promise to fulfil it (*Eastwood v. Kenyon*, 1840, 11 Ad. & E. 438). This is really part of a wider rule, namely, that a past benefit incurred or detriment undertaken by the promisee without the promisor's request is no consideration for a promise (*Roscorla v. Thomas*, 1842, 3 Q. B. 324). Acceptance of a performance which has been requested will generally support the inference of a promise to pay a reasonable reward, and a subsequent express promise will show what the parties thought reasonable. Authorities which seem to go beyond this either relate to duties “implied by law,” now called QUASI-CONTRACTS (which see), where there is no real agreement at all, or are now at least open to discussion (see per Bowen, L.J., *Stewart v. Casey*, [1891] 1 Ch. 104, 115).

Doing what one is bound to do by the general law or an existing contract with the other party, or the promise thereof, is clearly no consideration. But additional service or risk in the same matter may be a good consideration (*England v. Davidson*, 1840, 11 Ad. & E. 856; *Hartley v. Ponsonby*, 1857, 7 El. & Bl. 872).

Performance of what one is already bound to perform by a contract with A. cannot on principle, for want of any new detriment, be any consideration for a new promise by Z., a stranger to the contract; and it is doubtful whether a promise of such performance made to Z. can be. There is some English authority for allowing such considerations (*Shadwell v. Shadwell*, 1860, 9 C. B. N. S. 159; *Scotson v. Pegg*, 1861, 6 H. & N. 295). It is generally held otherwise in America (see *Harr. Law Rev.* viii. 38). It seems immaterial whether Z. knows of the previous contract or not. A real and distinct promise to Z. not to rescind or vary, even with A.'s consent, an existing contract with A., would be well enough.

Parties may agree that a thing of one kind shall be taken in satisfaction for what is due in another kind, without question as to equality of value; as a chattel for a money debt, or even a negotiable instrument which is not legal tender, though it be for a less amount than the existing debt (*Goddard v. O'Brien*, 1882, 9 Q. B. D. 37). But the law cannot regard a less sum of money as equivalent to a greater sum payable at the same time and place; and the obligation of a contract cannot be waived, any more than it can be created, without any consideration at all. Hence acceptance of a less sum of money as in satisfaction of a greater is no discharge of the residue (*Pinnel's case*, 1602, 5 Co. Rep. 117; *Foakes v. Beer*, 1884, 9 App. Cas. 605). Payment of a smaller sum one day before the larger one was due, or at a place where the debtor was not bound to pay, would be well enough.

Ordinary compositions with creditors are outside this rule, for each creditor accepts less than his due in consideration, not only of payment by the debtor, but of the like forbearance by the other creditors (*Good v. Chesman*, 1831, 2 Barn. & Adol. 328).

5. Capacity of Parties.—As to disabilities and immunities flowing from rules of public law of general application (alien enemies, foreign sovereigns, etc.), and peculiar professional rules (barristers, physicians), see Anson, 8th ed., 107.

Infants (*q.v.* for details). At common law an infant's contract is voidable (not void, *Williams v. Moor*, 1843, 11 Mee. & W. 256), *i.e.* he may enforce it within age (but not by specific performance, for want of mutuality, *Flight v. Bolland*, 1828, 4 Russ. 298; 28 R. R. 101), and ratify it at full age so as to bind himself. But contracts which the Court can see to be for the infant's benefit (*Clements v. L. & N. W. Ry. Co.*, [1894] 2 Q. B. 482) are valid, and especially contracts for necessities. What is necessary is a question of fact, according to the infant's condition in life and circumstances (not what the other party knows or thinks, *Barnes v. Toye*, 1884, 13 Q. B. D. 410; *Johnstone v. Marks*, 1887, 19 Q. B. D. 509), subject to the judgment of the Court whether there is evidence on which the particular goods or services can reasonably be held necessary (*Ryder v. Wombwell*, 1868, L. R. 4 Ex. 32). This is an application of the general rule as to interfering with the verdict of a jury.

The Infants Relief Act, 1874, has deprived adults of the power to make themselves liable by express ratification for obligations contracted during infancy. But it does not follow that an infant can repudiate a continuing contract, or recover back money paid for a consideration, of which he has accepted the benefit (*Smith v. King*, [1892] 2 Q. B. 543; *Edwards v. Carter*, [1893] App. Cas. 360; *Valentini v. Canali*, 1889, 24 Q. B. D. 166). Otherwise if he has received no benefit at all (*Hamilton v. Vaughan-Sherrin Co.*, [1894] 3 Ch. 589).

Married Women.—At common law, subject to certain exceptions by custom and otherwise which are no longer of importance, a married woman is incapable of contracting; but in equity she has power to dispose of, and to bind by her engagements, property given in trust for her separate use, unless there is an express restraint on anticipation; the primary object of the equitable rules being the protection of wives' fortunes from their husbands. The Married Women's Property Acts, 1882 and 1893, have enabled married women to acquire and hold separate property in their own names, and to contract to the extent of that property (since the Act of 1893 not merely separate property existing at the date of the contract). But there is still no personal liability. Restraint on anticipation, where it exists, is not interfered with (as to the limit of this, *Hood-Barrs v. Heriot*, [1896] App. Cas. 174; *Hood-Barrs v. Cathcart*, [1894] 2 Q. B. 559). For details, see HUSBAND AND WIFE.

Agency may be regarded both as a means of extending the contracting power of the principal, and as being itself a special kind of contract. See PRINCIPAL AND AGENT.

Corporations.—The possibility in law of forming bodies with perpetual succession, artificial persons having no necessary or natural term of life, may be regarded as an extension of individual capacity. But corporations, as being artificial persons, are subject to some restrictions peculiar to themselves. A corporation can act and bind itself only by some agent, and the common law rule is that the proper evidence of authority to represent a corporation is its common seal. Hence it has been laid down that a corporation must contract under seal except where the needs of daily small affairs, or the purposes for which the corporation was created, do not admit of waiting for the formality of a deed. In modern times the exception has outgrown the rule. Trading companies have long been held entitled to issue negotiable instruments, and the modern rule is that the seal is not needed

for contracts occurring in the ordinary course of business (*South of Ireland Colliery Co. v. Waddle*, 1869, L. R. 4 C. P. 617, Ex. Ch.). Moreover, the vast majority of existing corporations are formed under statutory powers, and are governed as to the form of their corporate acts and otherwise by statutory regulations, so that the old rule is practically obsolete.

In some cases formality is expressly prescribed by statute for the contracts of municipal and local corporations, and then observance of the form is imperative (*Young v. Mayor of Leamington*, 1883, 8 App. Cas. 517).

As to the substantial power of corporations to contract, it seems at common law to be limited only by the nature of an artificial person, but corporations created by statute, or under the authority of general statutes, such as the Companies Acts, for definite purposes, are held incapable of binding themselves for objects clearly beyond those purposes as declared in the company's constitution (*Ashbury Ry. Carriage Co. v. Riche*, 1875, L. R. 7 H. L. 653). The practical result is that nowadays, in cases under the Companies Acts, the memorandum of association is always framed in terms wide enough to cover everything that the company can ever by possibility want to do, and questions of corporate contracts being *ultra vires* are infrequent. See COMPANY.

Lunatics and drunken persons are not incapable of contracting. The contract of such a person is voidable only if he was at the time, and to the other party's knowledge, unable to understand the effect of the transaction (*Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 601, C. A.); and in that case he may ratify the contract when sane or sober (*Matthews v. Baxter*, 1873, L. R. 8 Ex. 132).

6. *Consent when invalid*.—A promise may be given under mistake, that is, by reason of an erroneous belief of the promisor without which he would not have promised. The promisee may or may not have contributed to the mistake by some misrepresentation. The misrepresentation, if any, may be innocent or fraudulent.

Mistake does not of itself affect the validity of a promise unless it be such as to prevent any real agreement from being formed.

Misrepresentation without fraud renders a promise voidable in certain classes of cases where the promisee is under a special duty to give full and correct information. Also parties may, if they please, make the truth of any particular statement a condition of the contract.

Fraud "cuts down everything," and always entitles the defrauded promisor to rescind the contract.

Questions under these heads constantly involve the preliminary question what the terms of the contract really were. The leading principle is that a man is bound to make good, not whatever the other party believed or expected, but what he has given him just cause to expect and rely on. Offers and promises amount to that which they reasonably appear to be to the persons to whom they are made. Simple as this appears, it will be found to resolve many difficulties.

7. *Mistake* may go to the root of the agreement in respect of—

(1) The nature of the obligation undertaken, as where a man indorsed a bill which he was told was a guaranty, and was not liable even to a *bona fide* holder (*Foster v. Mackinnon*, 1869, L. R. 4 C. P. 704). Such cases can hardly occur without fraud somewhere, but fraud is not the ground of the promisor not being liable. The possibility of the promisor being estopped by waiver of all inquiry, or by negligence, must not be overlooked.

(2) The person of the promisee. If A. induces Z. to deal with him by pretending to be M., not only is Z. not bound to perform any promise so

obtained, but actual delivery of goods by Z. to A. under such a promise is no delivery in law, and passes no property (*Cundy v. Lindsay*, 1878, 3 App. Cas. 459). Apart from fraud, A. cannot accept an offer which in fact was addressed only to B. (*Boulton v. Jones*, 1857, 2 H. & N. 564; *Boston Ice Co. v. Potter*, 1877, 123 Mass. 28).

(3) The subject-matter of the contract. The thing (*Couturier v. Hastie*, 1856, 5 H. & C. 673), or the legal interest in an existing thing (*Cooper v. Phibbs*, 1867, L. R. 2 H. L. 149, 170), with which the parties intend and purport to deal, may, unknown to both, have ceased to exist. *Suæ rei emptio non valet* (*Bingham v. Bingham*, 1748, 1 Ves. Sen. 126). If the real facts are not unknown to both parties, we have a question of either fraud or estoppel, which must be treated somewhat differently.

Again, the parties, notwithstanding apparent agreement in terms, may mean different things. This, without fault on either side introducing complications, is a rare but possible case (*Raffles v. Wichelhaus*, 1864, 2 H. & C. 906).

Again, there may be an agreement applicable in terms to an existing subject-matter, which, however, has not some specific attribute alleged to be essential to the description by which it was contracted for, though not specified in terms. In such a case a buyer seeking to avoid the contract must show not only that he expected the missing attribute (*e.g.* meant to buy only old oats, not new), and the seller knew it, but that he expected it as part of what the seller was contracting to give him, and the seller knew this (*Smith v. Hughes*, 1871, L. R. 6 Q. B. 597). This also is a rare case.

It is not uncommon for parties who are really agreed to express their intention incorrectly. In many such cases the ordinary rules of construction, and knowledge of the common forms of instruments, will suffice to collect the real meaning from the context. Moreover, courts of equity have jurisdiction to rectify instruments in accordance with the true intention on having clear proof of what that intention was. See RECTIFICATION.

Cases may occur (practically confined to actions for the specific performance of agreements for selling or letting land) where an apparent agreement cannot be enforced, because it does not express the real agreement, nor yet the real agreement, because it cannot be proved in the manner required by the Statute of Frauds. See VENDOR AND PURCHASER.

8. *Misrepresentation*.—Parties may make the truth of any statement the basis of their contract, a condition, in the strict and proper sense, of its validity; and this either by embodying it in terms (*Behn v. Burness*, 1862, 1 B. & S. 877; 3 B. & S. 751), or, where the contract is informal, by assuming it in the course of the negotiation (*Bannerman v. White*, 1861, 10 C. B. N. S. 844). They may also stipulate, as is constantly done in leases, conditions of sale, and other kinds of contracts, that breach of some particular term of a contract by one party shall entitle the other to rescind the whole. Whether and how far they have done any of these things is really a question of interpretation.

It remains to be seen in what cases the law will expect a party who honestly makes an erroneous statement inducing a contract, and not amounting to a term of the contract, condition, or warranty, to know, without any special notice beyond the nature of the contract, that the other party is contracting in reliance on his statement, and would not enter into the contract otherwise. Some think the rule of equity, now the rule of all English courts, to be that innocent misrepresentation is a ground for setting aside contracts of every description (Anson, p. 154; Indian Con-

tract Act, ss. 18, 19). This is obviously not so with the contract to marry, where even fraud has no effect unless such as to exclude any real consent (*Ford v. Stier*, [1896] Prob. 1); but putting aside that case as anomalous, we cannot reconcile the wide rule proposed with the familiar law of the sale of goods. The question seems, on principle, to be whether the particular fact is or should be specially within the knowledge of the party who, however innocently, mistakes or omits to state it. We submit that there is no duty, beyond that of abstaining from fraud, as to facts equally accessible to both parties (see Lord Mansfield's judgment in *Carter v. Boehm*, 1766, 3 Burr. 1905); but that as to facts specially within the knowledge of either party (and as to which, therefore, the other may be expected to rely on him) he must not mislead the other, however innocently, by misstatement or even non-disclosure of them. And this we believe to be the real result of the authorities. "In all cases of misrepresentation, the fundamental question is as to the right of the party to whom the representation is made to act upon it" (Harriman, at pp. 251, 252).

The chief classes of contracts to which this principle is applied are those of INSURANCE (which see) and sale and letting of land (see VENDOR AND PURCHASER). In such cases misrepresentations made in perfect good faith, and even misleading combinations of statements, say by a vendor and his agent, which were made in good faith and true as regards the respective knowledge of their makers (*Nottingham Brick Co. v. Butler*, 1886, 6 Q. B. D. 778), have constantly been held sufficient ground for setting the contract aside.

Uberrima fides is required in the relations between the parties to contracts of agency, partnership, and to a certain extent suretyship, at all events after these contracts are formed, and also in family arrangements. Promoters of companies are under special duties of full disclosure developed on the analogies of partnership and agency (see COMPANY).

9. We now come to misrepresentation which is wilfully or recklessly false, as being made with knowledge that it is false or without belief that it is true. This is FRAUD (*q.v.* as to its distinct character as an actionable wrong), and a contract obtained by fraud is always at least voidable. If the fraud is such as to induce fundamental mistake, there is no contract at all (*supra*, p. 343), but the fraudulent party will be bound by estoppel if the other chooses to affirm the transaction. Every promise includes the representation of an existing intention to perform it; therefore a promise made with the intention of not performing it is fraudulent, and entitles the other party to rescind the contract (see *Clough v. L. & N. W. Ry. Co.*, 1871, Ex. Ch. L. R. 7 Ex. 26).

Note that the fraud (or, where innocent misrepresentation is enough, misrepresentation) which will make a contract voidable must really induce the contract. The party misled must have contracted in reliance on the false statement, and the party making it must have intended him to rely on it. Preparations for a deceit which is not executed (as patching up a flaw to baffle an inspection which is never made) are not actionable or contractual fraud (*Horsfall v. Thomas*, 1862, 1 H. & C. 90). It is quite possible, on the other hand, to commit fraud with good intentions for all parties (*Polhill v. Walter*, 1832, 3 Barn. & Adol. 114), or hoping that no harm will be done (*Foster v. Charles*, 1830, 7 Bing. 105).

A party who actually knows the truth, or has formed his own opinion by independent inquiry (*Farrar v. Churchill*, 1830, 135 U. S. 609), can of course not be deceived, but the possession of means of knowledge will not be held equivalent to actual knowledge, for a man may be put off inquiry

because he has a right to rely, and does rely, on the other's information (*Dyer v. Hargrave*, 1805, 10 Ves. at p. 510; 8 R. R. 39; *Redgrave v. Hurd*, 1881, 20 Ch. D. 1).

It used to be said that the misleading representation must be of matter of fact. But the better opinion seems now to be that if the situation of the parties makes it natural and reasonable for one of them (say an illiterate person) to trust the other's statement of matter of law, such a case is properly treated as one of superior knowledge on the one side and confidence on the other, and is within the general rule above stated. There is not believed to be any real authority to the contrary.

10. Consent may be vitiated not only by not being rightly informed, but by not being free. It may be extorted by coercion, which the law calls *duress*, and which, under strictly limited conditions, may render a contract voidable. There are practically no modern examples; but as to the possibility of compulsion excluding consent altogether, even in the case of marriage, see *Scott v. Sebright*, 1886, 12 P. D. 21; *Ford v. Stier*, [1896] Prob. 1.

But where parties are in a standing relation of authority of any kind, legal or moral, on the one side, and confidence on the other, the equitable doctrine of **UNDUE INFLUENCE** (*q.v.* for details) meets the difficulty of proving coercion or fraud specifically, by throwing on the superior party the burden of upholding the fairness of any donation or beneficial contract obtained by him from the inferior. In many common cases (parent, guardian, trustee, medical attendant, legal adviser, spiritual director, and the like) the existence of general authority or influence is presumed from the well-known character of the relation. In other cases it may be proved, and when this is done the same consequences follow (*Morley v. Loughnan*, [1893] 1 Ch. 736). On the whole subject *Allcard v. Skinner*, 1887, 36 Ch. D. 145, is the modern leading case. Practically, the donee will hardly ever succeed without showing that the donor had access, at least, to independent advice.

It has once or twice been laid down in unguarded terms that in all cases of voluntary gift the donee is bound to show that the transaction is righteous. Whether this be natural justice or not, it is not the law. But it is true that the presumption against undue influence is applied with special strictness to voluntary settlements, and good intentions on the part of the controlling party are no defence (*Dutton v. Thompson*, 1883, 23 Ch. D. 278); also to oppressive money-lending bargains with "expectant heirs" and persons in distressed circumstances; *O'Rorke v. Bolingbroke*, 1877, 2 App. Cas. 814, marks the modern limits of interference. Authorities are collected in *Fry v. Lane*, 1888, 40 Ch. D. 312; and see **CATCHING BARGAINS**.

This jurisdiction has been recently and effectively applied in British India, though not adequately recognised in the Codes (see *Rajah Mokham Singh v. Rajah Rup Singh*, 1893, L. R. 20 Ind. App. 127).

A contract voidable for any of the above-mentioned causes may be avoided or affirmed at his election by the party entitled; and acting on the contract as subsisting, or acquiescence, may be equivalent to affirmative election not only as against third parties who have acquired interests under the transaction in good faith and for value (*Clough v. L. & N. W. Ry. Co.*, 1871, L. R. 7 Ex. 26), but also, though less easily, as against the party in fault (*Allcard v. Skinner*, 1887, 36 Ch. D. 145). Acquiescence, *i.e.* failure to rescind within a reasonable time, does not depend on lapse of time alone; the conduct of the parties must be considered (*Rochevoucauld v. Boustead*, [1897] 1 Ch. 196, 211, C. A.).

11. *Unlawful Agreements.*—The general rule that the free and deliberate intention of the parties governs matters of contract is overridden, not only where the performance of the agreement would involve acts contrary to law, but in divers cases where, for paramount reasons of policy, the Courts, though they cannot punish or restrain performance, refuse their aid in enforcing it.

Thus agreements to commit criminal offences or frauds, to marry within the prohibited degrees, or live in illicit intercourse, are all void at law. Questions which may arise are (a) whether an agreement really contemplates unlawful acts, or is a step in a larger transaction unlawful as a whole (*Fisher v. Bridges*, 1854, 3 El. & Bl. 642); (b) whether, where non-compliance with statutory provisions is involved, those provisions were strictly prohibitive or not (omissions to stamp documents, take out licences, etc.). The text-books must be consulted for details.

As regards agreements which, on grounds of public policy, are not enforceable, though there is no law to prevent the parties from performing them if they choose, the kinds most fruitful of modern case-law have been wagers and contracts relating to the payment of bets (with great complication from statutes; see GAMING ACTS; WAGERS; and Anson, pp. 186–195), and agreements in restraint of trade. As to these last the governing decision is now *Maxim-Nordenfelt Co. v. Nordenfelt*, [1894] App. Cas. 535. The old fixed rules as to limits of space are no longer of authority, and a contract in restraint of trade is good if (whether under seal or not) it is made for valuable (not necessarily adequate) consideration; if the restraint undertaken by the promisor does not exceed what may be reasonably required for the protection of the promisee; and if there is no manifest injury to the public interest. See RESTRAINT OF TRADE.

12. *Impossibility* is not really a substantive ground of avoiding contracts any more than mistake. Where performance appears to be, or to have become, impossible, it has to be considered whether the promise was really serious and unconditional. As to the first point, the law is made for reasonable men, and the usual signs of consent are no longer acceptable if the matter is, on the face of it, such as no reasonable man could undertake. Either the parties were not serious or they did not understand the effect of the promise as framed. This would seem to be the key to such cases as that of a promise to deliver two grains of rye on a Monday, and four, eight, and so on in geometrical progression on alternate Mondays for a year (*Thornborow v. Whitacre*, 1706, 2 Raym. (Ld.) 1164); which, however, are of no modern practical interest. The other point is often material. It may be put thus: Did the promisor contract subject to an implied exception in case performance should, unknown to the parties, be impossible, or become so by inevitable accident? or did he warrant that performance should be and continue possible in fact and in law? This is a matter of interpretation; but, as parties often omit to explain their intentions with regard to contingencies which in truth they never thought of, it has been found needful to lay down rules for guidance in such cases.

Generally a man is not held to warrant possibility in law, i.e. is discharged from his promise if performance is subsequently forbidden or otherwise becomes impossible by operation of law (*Bailey v. De Crespigny*, 1869, L. R. 4 Q. B. 180).

One is not held to warrant possibility in fact in the following cases:—Agreements relating to a specific subject-matter the existence of which is assumed by both parties, but which in truth does not exist at the date of

the agreement (*Clifford v. Watts*, 1871, L. R. 5 C. P. 577; Sale of Goods Act, 1893, s. 5), or between that date and the time for performance is destroyed by accident beyond the parties' control (*Taylor v. Caldwell*, 1863, 3 B. & S. 826; *Appleby v. Myers*, 1867, L. R. 2 C. P. 651), or fails to be produced (*Howell v. Coupland*, 1876, 1 Q. B. D. 258); agreements for personal service which become impossible by the death, sickness, or the like of the person who was to perform them (*qu. how far this would apply to any case where there is a remedy over against a third person, e.g. disablement by negligence of a railway or shipping company*) (*Robinson v. Davison*, 1871, L. R. 6 Ex. 269). But in other cases there is no general presumption that impossibility or difficulty of performance was intended to be an excuse (see Anson, pp. 322, 323).

Impossibility caused by default of either party is only one form of breach of contract (see below).

13. *Interpretation of Contracts.*—The fundamental question is what the promisor gave the promisee a right to expect, and the fundamental rule for ascertaining this is that "in all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other" (per Blackburn, J., *Fowkes v. Manchester and London Assurance Association*, 1863, 3 B. & S. 917, 929 (this supersedes Paley's attempted definition, which has nevertheless been discussed much later)). Not only the detailed rules of construction, but many rules of evidence, and the whole law of estoppel, are developments of the same principle.

We have to know first what were the terms of a contract (evidence), and then what was its effect (construction).

As to evidence: the terms of a contract, if and so far as expressed in writing by the parties, may not be contradicted by oral evidence, and this is the rule of equity as well as of law (*Price v. Dyer*, 1810, 17 Ves. 356, 364; 11 R. R. 102, 107). But it may be shown that a document which looks like an agreement was not a concluded agreement at all (*Pym v. Campbell*, 1856, 6 El. & Bl. 370; *Pattle v. Hornibrook*, [1897] 1 Ch. 25). As to the admission of "collateral agreements" not inconsistent with a principal contract even by deed, *Erskine v. Adeane*, 1873, L. R. 8 Ch. 756, 766; *Angell v. Duke*, 1875, L. R. 10 Q. B. 174: no separate consideration is required for such agreements, which are in the nature of warranties.

Particular terms may be explained by proof of their conventional meaning in local or trade usage, and customary terms (not inconsistent with the express terms) may be added, on the ground that the parties meant to contract with reference to the known usage, "not to alter the contract, but to show what the contract is" (*Grant v. Maddox*, 15 Mee. & W. 737). See the notes to *Wigglesworth v. Dallison* in 1 Sm. L. C.

As to construction: the general rules for the construction of instruments in writing are applicable (as to which, see Elphinstone, Norton and Clark on the *Interpretation of Deeds*). The intention of the parties must be collected from the expression of it as a whole (*Ford v. Beech*, 1843, 11 Q. B. at p. 866), that is, from expressed, not from conjectured, intention (Jessel, M. R., in *Smith v. Lucas*, 1881, 18 Ch. D. at p. 542).

In some well-known classes of instruments (as mortgages, bonds, marine policies) the common forms have received an artificial construction by a series of judicial decisions originally intended to control rather than to effectuate the intention; they are now used with full knowledge of that construction, and with the intent that they shall bear it (*Wallis v. Smith*, 1882, 21 Ch. D. 243, 254).

14. *Discharge of Contracts.*—The obligation of a contract may be determined by agreement of the parties before performance; by performance, including tender when deemed equivalent to performance; by breach; and, in particular cases, by operation of law.

As to discharge by agreement, performance may be dispensed with either by a release under seal, which needs no consideration, or by an agreement without deed, which must be a mutual agreement satisfying the conditions of a new contract, though the common form is to plead it simply as discharge (*King v. Gillett*, 1840, 7 Mee. & W. 55). A contract consisting of mutual promises is well discharged by mutual agreement alone; the discharge of each promise being the consideration for the discharge of the other. Where there has been performance on one side, the discharge of the promise remaining unexecuted requires a fresh consideration; but there is an exception to this rule as to negotiable instruments governed by the law merchant (*Foster v. Dawber*, 1851, 6 Ex. Rep. 839; see now Bills of Exchange Act, 1882, s. 62).

An agreement required by law to be in writing cannot be superseded or varied by a fresh agreement not in writing. But where the agreement, if not in writing, is not void, but only not enforceable (as by sec. 4 of the Statute of Frauds), it seems that a discharge by oral agreement is good (*Goss v. Lord Nugent*, 1833, 5 Barn. & Adol. 58). An attempted variation of such a contract cannot be treated as rescinding it (*Noble v. Ward* in Ex. Ch. 1867, L. R. 2 Ex. 135; see per Willes, J., at p. 138); but this does not mean that a plaintiff who has voluntarily waived some part of the defendant's performance cannot afterwards sue if he is ready and willing to perform his part of the original terms (*Hickman v. Haynes*, 1875, L. R. 10 C. P. 590; *Plevins v. Downing*, 1876, 1 C. P. D. 220).

As to the discharge of a promisor in consideration of the substituted liability of a new party, see NOVATION.

The terms of the original contract may include an agreement that it shall be discharged in one or more specified events. Such provisions are called conditions subsequent when they do not involve any option or further act of the parties as part of the contingency which is to determine the contract. The "excepted risks" of charter-parties and contracts of carriage are conditions subsequent. Optional powers, express or annexed by custom, to determine or continue particular kinds of contracts by notice, are of constant occurrence. Tenancy from year to year is a familiar example. Express option to rescind in certain events is common in contracts for the sale of land (see VENDOR AND PURCHASER; CONDITIONS OF SALE).

15. *Performance* of a contract means performance of its terms and the whole of its terms, not the offer of something different which the promisor alleges will do as well (see *Bowes v. Shand*, 1877, 2 App. Cas. 455; *Filley v. Pope*, 1885, 115 U. S. 213; *Reuter v. Sala*, 1879, 4 C. P. D. 239). The promisee must not be put to any risk or trouble which he has not undertaken (*Levy v. Green*, in Ex. Ch. 1859, 1 El. & El. 969).

What will be, in fact, sufficient performance must always depend on the nature and terms of the contract. Rules as to time and place such as the older books give are only auxiliary. So far as these are of modern practical use, they may be found in *Startup v. Macdonald*, 1843, 6 Man. & G. 593.

As to tender, which seldom comes in question now, see Leake, 739-747, or Anson, 284, 285.

The equitable rule that time, in agreements for the sale of land, is "of the essence of the contract" only when a special intention of the parties to that effect appears (see VENDOR AND PURCHASER) does not apply to mer-

entitled contracts (see *Reuter v. Sala*, 4 C. P. D. at p. 249; *Norrington v. Wright*, 115 U. S. at p. 203).

16. *Breach of Contract*.—This may happen in three ways—prevention, refusal, and default active or passive. When a promisor has broken his contract, the promisee acquires a right of action for the breach, and can sue for DAMAGES, or in appropriate cases SPECIFIC PERFORMANCE (see those titles). Sometimes the promisee is also discharged from performance, or further performance, on his own part.

As to prevention: if the promisor disables himself from performance even before the time, it is a breach (21 Edw. iv. 54, pl. 26, *Main's case*, 5 Co. Rep. 20 b). So if the promisee prevents the promisor from performing his part, the promisor is discharged (*Raymond v. Minton*, 1866, L. R. 1 Ex. 244, and see *Roberts v. Bury Commissioners*, 1870, L. R. 5 C. P. 310, 329).

As to refusal: a total refusal to perform discharges the other party from doing more on his part, and entitles him to recover for what he has already done (*Mavor v. Pyne*, 1825, 3 Bing. at p. 288; 28 R. R. 626; *Withers v. Reynolds*, 1831, 2 Barn. & Adol. 882). Refusal before the time for performance may be treated as an immediate breach at the other party's election (*Frost v. Knight*, 1872, in Ex. Ch. L. R. 7 Ex. 111; *Synge v. Synge*, [1894] 1 Q. B. 466, C. A.); provided that the refusal is absolute, and the election exercised in due time (*Johnstone v. Milling*, 1886, 16 Q. B. D. 460).

Default or failure in performance without excuse is, of course, a breach. The chief question under this head, besides that of the measure of damages, has been as to the effect on the other party's obligations where the contract consists of mutual promises. This depends on the intention of the parties as shown by the whole contract. Their meaning may be that—

(a) Performance of some term, or even of the whole, must be complete on one side before anything is due on the other (conditions precedent). Generally a party is entitled to some compensation for what he has actually done under the contract, if the performance is divisible into portions having any separate value; but it may be stipulated that only by performance of the whole shall anything at all be earned (*Cutter v. Powell*, 1795, 6 T. R. 320; 3 R. R. 185);

(b) Performance on the one side is to depend on, and go along with, performance on the other, as when goods are to be paid for as and when delivered (reciprocal or concurrent conditions);

(c) Performance on either side is to be due without regard to performance on the other, and the only remedy for non-performance in any point is to be in damages (independent promises).

The attempt to lay down fixed rules of law as to this has been abandoned for quite a century. "Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done" (Lord Kenyon in *Morton v. Lamb*, 1797, 7 T. R. 125; 4 R. R. 395). Such rules as are approved by modern authorities (see notes to *Pordage v. Cole*, 1 Wms. Saund. 551) are only canons of construction which will always yield to the manifest intention of the parties. A term not so material that, looking to the contract as a whole, performance of the residue would be something different in substance from what was bargained for, is not presumed to be a condition precedent (*Bettini v. Gye*, 1876, 1 Q. B. D. 183).

As to the difficulties raised in this connection upon contracts for the delivery of goods by instalments, see SALE OF GOODS. *Mersey Steel and Iron*

Co. v. Naylor, 1884, 9 App. Cas. 434; *Norrington v. Wright*, 1885, 115 U. S. 189, are the latest leading authorities. The Sale of Goods Act, s. 31, purposely leaves the question open.

[*Authorities*.—Text-books (not including monographs on any special classes of contracts, or, except Mr. Langdell's classical series of dissertations, books not published or re-edited within the last ten years); Addison (9th ed., 1892); Anson (8th ed., 1895); Chitty (13th ed., 1896); Clark Hare (Boston, Mass. 1887); Harriman (Boston, Mass. 1896); Keener, *Quasi-Contracts* (New York, 1893); Langdell (2nd ed., Boston, Mass. 1880); Leake (3rd ed., 1892); Parsons (8th ed., Boston, Mass. 1893); Pollock (6th ed., 1894); Finch's *Select Cases* (2nd ed., 1896); Fry on *Specific Performance* (3rd ed., 1892); Keener's *Select Cases on Quasi-Contracts* (2 vols., Cambridge, Mass. 1888-89).]

As to ASSIGNMENTS OF CHOSSES IN ACTION, including contracts, see vol. i. p. 352.

Contract Note.—In the Stamp Act, 1891, a contract note means the note sent by a broker or agent to his principal (except where such principal is himself acting as broker or agent for a principal) advising him of the sale or purchase of any stock or marketable security. Each advice as to a different description of stock is a separate note. The duty is sixpence, denoted by an adhesive stamp, to be cancelled by the person by whom the note is executed (s. 52). The stamp was increased to one shilling, by the Stamp Act, 1893, where the note is for or in respect of any stock or marketable security of the value of £100 or upwards. The stamp duty may be added to the charge for brokerage or agency (56 Vict. c. 7). The penalty for not stamping a note made on the purchase to a value of £5 or upwards is £20, and the broker can have no legal claim for brokerage commission or agency with reference to the sale or purchase of any stock or marketable security of the value of £5 or upwards mentioned or referred to in the note, unless the note is duly stamped (Act of 1891, s. 53). But if the broker carries over stock without making a contract note, although he incurs a penalty of £20 (Act of 1891, s. 53 (1)), he can recover commission (*Leaoyd v. Bracken*, [1894] 1 Q. B. 114).

See BOUGHT AND SOLD NOTES and BROKER.

Contractor.—The principle—*respondet superior*—upon which a master is held responsible for the unlawful acts of his servant, done in the course of the servant's employment, does not extend to make an employer responsible for the unlawful act of a person, not in his service, with whom he has contracted to do the work, in the course of which the default occurred. Such a person is commonly described in this connection as "an independent contractor." Below he is called a "contractor" simply. A contrary view formerly prevailed (see *Bush v. Steinman*, 1799, 1 Bos. & Pul. 404), but it is now overruled (*Allen v. Hayward*, 1845, 7 Q. B. 960; *Reedie v. L. & N.-W. Ry. Co.*, 1849, 4 Ex. Rep. 244). Thus the owner of a carriage is not liable for the coachman's negligence if he is not negligent himself, and the coachman is not his servant, but is hired with the horses from a job-master (*Quarman v. Burnett*, 1840, 6 Mee. & W. 499; *Jones v. Corporation of Liverpool*, 1885, 14 Q. B. D. 890; *Donovan v. Laing, etc., Syndicate*, [1893] 1 Q. B. 629). Nor is a builder liable for the defaults of a gasfitter with whom he has contracted for the gas-fitting (*Rapson v. Cubitt*, 1842, 9 Mee. & W. 710), nor the owner of a bullock for the negligent driv-

ing of a licensed drover whom he has engaged to drive it (*Milligan v. Wedge*, 1840, 12 Ad. & E. 737). The latest authority is *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335.

Fixed Property.—It makes no difference that the work to be done by the contractor is in connection with land or houses (*Reedie v. L. & N.-W. Ry. Co.*, *supra*), the distinction taken by Littledale, J., in *Laugher v. Pointer*, 1826, 5 Barn. & Cress. 547, having been abandoned. In *Reedie v. L. & N.-W. Ry. Co.* the injury was caused by a contractor's workman having negligently allowed a stone to fall from a bridge upon which his master was engaged, and the owners of the bridge were held not to be liable. (But see the exceptions below.)

Exceptions.—1. The employer is liable in respect of the act which he has directed to be done. What the rule exempts him from is the negligence ("collateral negligence," per Lord Blackburn in *Dalton v. Angus*, 1881, 6 App. Cas. at p. 829) of the contractor in doing the work. So where the contractor was engaged to open the street in order to lay gas pipes, the employer having no right to open it (*Ellis v. Sheffield Gas Co.*, 1853, 2 El. & Bl. 767), or to dig away ground in which a neighbouring owner had a right of support (*Angus v. Dalton*, 1878, 4 Q. B. D. 162; 6 App. Cas. 740), the employer was liable for the consequences, and the same result follows if the work cannot be done in a lawful manner (*Peachey v. Roland*, 1853, 13 C. B. 182).

2. Where the work is necessarily dangerous, unless special precautions are taken, the employer must see that sufficient precautions are taken by the contractor at his peril, and he will be liable for the neglect of the requisite precautions to any person injured, and this notwithstanding that he may have expressly contracted that they shall be taken. He has, of course, his remedy over against the contractor. The leading cases on this exception have been cases of injury to neighbouring property in pulling down houses by which it was supported (*Bower v. Peate*, 1876, 1 Q. B. D. 321; approved in *Angus v. Dalton*, *supra*; *Hughes v. Percival*, 1883, 8 App. Cas. 443). To escape liability in such cases the employer must show that the contractor was not acting within the scope of his contract, but was a trespasser when he did the act complained of (*Black v. Christchurch Finance Co.*, [1894] App. Cas. 48). In the last case the defendant employed a contractor to burn the grass on his estate, directing him to do the work at a safe season. The contractor disregarded the direction, and the fire spread to an adjoining estate. The employer was held to be liable. In *Picard v. Smith*, 1861, 10 C. B. N. S. 470, the defendant employed a contractor to deliver coals at a station refreshment-room, and for that purpose to open a trap-door in the platform (*Beven*, *Negligence in Law*, p. 493).

3. Where the employer is under a statutory duty to do the work in a particular manner, as to make a bridge without interrupting the traffic, and the contractor does it in a different manner (*Gray v. Pullen*, 1864, 5 B. & S. 970; *Hole v. Sittingbourne Ry. Co.*, 1861, 6 H. & N. 488; see further, *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335).

4. Where the contractor's default occasions a nuisance, for which the employer is liable as an occupier (*Tarry v. Ashton*, 1876, 1 Q. B. D. 314); e.g. where the contractor fixes a dangerous lamp to the employer's house so that it overhangs the highway (*l.c.*). The mere fact that the default itself is a nuisance does not make the employer liable (*Overton v. Freeman*, 1851, 11 C. B. 867).

In the excepted cases both the contractor and the employer are liable for the wrong (*Le Maître v. Davis*, 1881, 19 Ch. D. 281; see *Gray v. Pullen*, *supra*).

Contractor or Servant.—The question is whether the relation of master and servant existed between the man who actually caused the injury and the defendant at the time of the accident. The employer of a contractor may, for example, have temporarily assumed control of the workman (see *Pendlebury v. Greenhalgh*, 1875, 1 Q. B. D. 36); or he may have hired plant or machinery and also the workman to use it (*Murray v. Currie*, 1870, L. R. 6 C. P. 24; *Oldfield v. Furness Co.*, 1893, 9 T. L. R. 515). In such cases the owner of the plant and machinery is not liable (*Donoran v. Laing, etc., Syndicate*, [1893] 1 Q. B. 629), but the employer is.

The test whether a man employed to do work is a servant or an independent contractor is the question: does the employer exercise, or has he the right to exercise, control ("personal control," *Stephen v. Thurso Commissioners*, 1876, 3 Sess. Ca. 4 Ser. 535) over the workman (*Martin v. Temperley*, 1843, 4 Q. B. 298; *Donoran v. Laing, etc., Syndicate, supra*), and direct him *how to do his work*? (*Sadler v. Hemlock*, 1855, 4 El. & Bl. 570; *Ruth v. Surrey Commercial Dock Co.*, 1891, 8 T. L. R. 116). If so, the relation is that of master and servant. A contractor does not become a servant, nor his workmen the servants of the employer, because the employer has stipulated for the right to dismiss the workmen (*Reedie v. L. & N.-W. Ry. Co.*, 1849, 4 Ex. 244), nor because the contractor is in the service of the employer to do other work (*Knight v. Fox*, 1850, 5 Ex. Rep. 721; *Overton v. Freeman*, 1851, 11 C. B. 867).

The facts of a case may raise a presumption that the defaulting workman was not in the service of the defendant, as where a householder was sued for an injury done by a workman who was repairing the roof of the house, such work being commonly done by a contractor (*Wellfare v. L. B. & S. C. Ry. Co.*, 1869, L. R. 4 Q. B. 693, at p. 696).

Common Employment.—The doctrine of common employment, which prevents a servant suing his master for injuries caused by a fellow-workman engaged in the same employment, does not apply between the servants of a contractor and the servants of an employer. For its application both the defaulting and the injured workmen must have been the servants of the defendant at the time of the accident (*Johnson v. Lindsey*, [1891] App. Cas. 371; *Cameron v. Mystrom*, [1893] App. Cas. 308). Mr. Beven suggests that a distinction taken in some of the cases on this point may be described as that between a "sub-contractor" and an "independent contractor," "where the relation is one of contract in independent work and not of co-operation in common work" (p. 819; see *Turner v. G. E. Ry. Co.*, 1875, 33 L. T. N. S. 431), but the cases in the House of Lords (above cited) appear to lay down a general rule.

[**Authorities.**—See generally Beven, *Negligence in Law*, bk. iv. ch. iii., and Story on *Agency*, ss. 453, 454. See also CAB; HIGHWAY; EXTRAORDINARY TRAFFIC; and SPECIFICATION.]

Contrary Intention.—In many statutes provisions are made respecting the effect or construction of documents unless a contrary intention is shown or expressed. Some decisions as to what constitutes a contrary intention in particular cases will be found collected in Stroud's *Judicial Dictionary* (s.v.).

As to the Wills Act, see WILL; as to Locke King's Acts, see LOCKE KING'S ACTS; and Theobald on *Wills*, 4th ed., p. 140.

The latest authority on the meaning in the expression of the Conveyancing Act, 1881, is *Broomfield v. Williams*, [1897] 1 Ch. 602.

Contravention.—1. In French law a distinction is drawn between *crimes*, *délits* (misdemeanours), and *contraventions*. In systematic treatises on English law there is a tendency to adopt this classification, and to apply the term contravention to petty misdemeanours, and minor neglects or defaults relating to by-laws and regulations of police, conviction for breach of which is not regarded as inflicting any moral or social stigma. But in law all acts forbidden by statute under penalty recoverable on indictment, or on information before a Court of summary jurisdiction, are misdemeanours, unless the statute otherwise provides; and as a consequence of the rule the accused person is not a competent witness in his own behalf except under express statutory enactment.

2. Contravention of a statute, where the statute is mandatory and not merely directory, and the matter prohibited or required is of public concern and no particular penalty is provided, is an indictable misdemeanour (*R. v. Hall*, [1891] 1 Q. B. 747). Where the prohibition or command is in addition to the common law as to the subject-matter, any penalty for disobedience is, subject to the particular terms of the enactment, presumed to be additional to or alternative on the common law sanction, provided that the offender cannot be punished twice (Interpretation Act, 1889, 52 & 53 Vict. c. 62, s. 33).

But where the command or prohibition is new and the statute prescribes a penalty, that penalty alone can be imposed, and the remedy by indictment for misdemeanour is not open (*R. v. Hall*, *ubi supra*; *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64).

3. Where contravention of a statute affects private rights, the nature of the private remedy depends on like considerations. If the statute prescribes or prohibits some new thing and contains a specific remedy for disobedience, that alone can be pursued (*Robinson v. Mayor, etc., of Workington*, [1897] 1 Q. B. 619; *Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 625). In these cases a distinction is drawn between non-feasance, or absolute failure to obey the statute, and misfeasance, *i.e.* negligence or other default in the mode of complying with the statute (see *Cowley v. Newmarket Local Board*, [1892] App. Cas. 345; *Oliver v. Horsham Local Board*, [1894] 1 Q. B. 832; *Municipality of Sydney v. Bourke*, [1895] App. Cas. 433).

In the case of non-feasance, where it is not criminal and a private suit will not lie, the remedy if any at common law is by prerogative mandamus (see *Peebles v. Oswaldtwistle District Council*, *ubi supra*).

4. Where contravention of a statute causes private damage and no specific remedy is provided by the statute, the person injured is entitled, unless a contrary intention appears from the statute, to recover damages by action on the case under 13 Edw. I. c. 50 (*Atkinson v. Newcastle Water Works Co.*, 1877, 2 Ex. D. 441).

5. Contracts and other agreements which are not in the form prescribed by statute or contemplate the doing of acts in contravention of statutory provisions, are either illegal, or void, and unenforceable, according to the terms of the enactments (*Melliss v. Shirley Local Board*, 1885, 16 Q. B. D. 453; *Stevens v. Gourley*, 1859, 7 C. B. N. S. 99, 529; *Brown v. Royal Insurance Co.*, 1859, 28 L. J. Q. B. 275). See FRAUDS, STATUTE OF; GAMING.

[*Authorities.*—See Maxwell on *Statutes*, 3rd ed., 554, 567; Hardcastle on *Statutes*, 2nd ed., 247–269.]

Contribution.—See PRINCIPAL AND SURETY.

Contributive Value.—This is a principle or theory sometimes applied in rating in one parish a hereditament which adds to the value of a hereditament in another parish. According to the parochial principle the value of a hereditament in a parish is alone to be considered. But when an undertaking like a railway extends through a number of parishes, there is a considerable difficulty in ascertaining what is the value of the portion in one particular parish. The proper method is to deduct from the earnings of the line in the parish the working expenses, the tenants' profits, and the landlord's deductions; what is left is the rateable value. The theory of contributive value is chiefly sought to be applied in the rating of branch lines, where the expenses are often in excess of the receipts; in such cases it is often contended for the parish authorities that the branch line, although of no value, if the receipts and expenses in the parish are alone regarded, is yet of value as bringing traffic to other parts of the system, and so enabling the company to earn profits outside the parish. This suggested value of a branch line or "feeder" is called contributive value. The decisions on the subject are conflicting. In *S.-E. Rwy. Co. v. Dorkin*, (1854, 3 El. & Bl. 491), and in *L. and N.-W. Rwy. Co. v. Cannock* (1863, 9 L. T. N. S. 325), it was held that the value of a branch line as a feeder was to be taken into account in ascertaining its rateable value; but in *R. v. Llantrisant* (1869, L. R. 4 Q. B. 354) it was held that the value of the traffic contributed by a line of railway in one parish to another line in different parishes was not to be taken into account in estimating the rateable value of the first-named line; and in *G. E. Rwy. Co. v. Haughley* (1866, L. R. 1 Q. B. 666) the Court decided against the contention of the parish authorities that in ascertaining the rateable value of the line within the parish the occupation of the line had a value beyond the profits actually earned in the parish, as contributing to earn additional profits in other parishes. When there are competing lines of railway, the enhanced value which a branch line would produce elsewhere than in the parish is an element to be considered in fixing the rateable value, because it is an element which would be considered in fixing the rent which a tenant would give for it (*R. v. L. and N.-W. Rwy. Co.*, 1874, L. R. 9 Q. B. 134; *L. and N.-W. Rwy. Co. v. Irthlingborough*, 1876, 35 L. T. 327). See the discussion of this subject in Balfour Browne, *Law of Rating*, 2nd ed., p. 139.

Contributory Negligence.—See NEGLIGENCE.

Control and Custody of the Court.—The Court, when required, takes under its control and custody the funds and effects of suitors. Orders may be obtained in certain cases for the interim custody and preservation of the subject-matter of an action. Deeds and documents may be kept in Court for safe custody or pending disputes between parties claiming title.

Cash under the Control of the Court.—The provisions with regard to dealing with the funds of suitors which are brought into or paid out of Court, will be fully considered under the titles PAY OFFICE, PAYMASTER-GENERAL. It may be here stated that cash under the control of, or subject to the order of, the Court, may be invested in the stocks, funds, or securities specified in R. S. C., Order 22, r. 17. That rule, which was introduced in November 1888, greatly enlarged the range of investments sanctioned by the Court for funds under its control. The facilities

thus afforded have been largely resorted to. Formerly it was almost invariable that orders directing the investment of funds in Court should provide that such investment should be made in the public funds. That mode of investment, indeed, is still the one most largely resorted to, but the reduction in the rate of interest on Government stocks effected by the National Debt Conversion Act, 1888, 51 Vict. c. 2, and by the National Debt Redemption Act, 1889, 52 Vict. c. 4, has naturally induced suitors to look for investments producing a higher rate of income. Since the rule of November 1888 came into operation, applications for change of investment have become very frequent, and large amounts of Government securities in Court have been sold, and now stand in the books of the Paymaster-General in other investments of various descriptions. The following figures, taken from the latest returns presented to Parliament by the Auditor-General pursuant to sec. 20 of the Chancery Funds Act, 1872, 35 & 36 Vict. c. 44, and sec. 4 of the Supreme Court of Judicature (Funds) Act, 1883, 46 & 47 Vict. c. 29, will give some idea of the magnitude of the financial operations transacted in the Pay Office. During the year ending the 28th February 1897 the amount of securities transferred into Court, or purchased, amounted to £4,814,114, 4s. 7d. The balance of securities in English currency at the same date amounted to no less a sum than £54,826,102, 15s. 9d., made up as follows:—British Government securities, £37,487,949, 3s.; other securities, £17,338,153, 12s. 9d. Of British railway securities alone the Paymaster-General holds for the suitors more than £6,000,000.

Effects.—The Court will also take charge of the “effects” of suitors, such as jewels or plate. By the Supreme Court Funds Rules, 1894, r. 2, “funds” includes boxes and other effects.

By the Chancery Funds Amended Orders, 1874 (repealed by R. S. C., Feb. 1895), r. 16, it was provided that the clerks of records and writs should not receive into their custody effects of the suitors consisting of jewels or plate, or other articles of the like nature, or negotiable securities; and by R. S. C., 1883, Order 61, r. 30, it is similarly provided that no such effects shall be deposited at the Central Office. Where, therefore, it is desired to lodge in Court articles of this character, they are required to be placed in a box and deposited at the bank, with the privity of the Paymaster-General. Before taking custody of a box, the agent, or other officer acting on behalf of the bank, may at his discretion require an inspection of its contents in presence of the party depositing it (Supreme Court Funds Rules, 1894, r. 29).

Interim Custody.—Order 50, r. 1, provides that when by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved, either wholly or partially, from such liability, the Court or judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court, or otherwise secured; and by r. 3 the Court or a judge may, upon the application of any party to any cause or matter, make any order for the detention, preservation, or inspection of any property or thing being the subject of such cause or matter, or as to which any question may arise therein. Under these provisions, orders have been made that jewellery as to which litigation was pending should be handed to an officer of the Court (*Velati v. Braham*, 1877, 46 L. J. C. P. 415); or deposited in Court (*Ridpath v. Zachner*, 1893, 9 T. R. 338).

Deposit of Deeds, etc.—Deeds and documents may be ordered to be

deposited in Court, where such deposit is desirable for the purpose of safe custody or otherwise. In particular an order for discovery may provide for the deeds and documents in the possession or power of the party giving discovery to be so deposited (for form of Order, see Seton, 5th ed., p. 47). In modern practice, however, orders to this effect are not common (see per Jessel, M. R., *Brown v. Seacell*, 1880, 16 Ch. D. p. 518); and the Court will not make such an order where the party giving production makes out a case of injury or inconvenience as likely to result from deposit in Court (*Dan. Ch. Pr.*, 6th ed., p. 1846). The discretion of the judge as to the place for production will not be readily interfered with by the Court of Appeal (*Prestney v. Corporation of Colchester*, 1883, 24 Ch. D. 376). In cases where documents are ordered to be deposited in Court, whether for safe custody, or for the purpose of any inquiry in chambers, or otherwise, they must be deposited in the Central Office (Order 61, r. 30). The party obtaining discovery is entitled to inspect and take copies of the deposited documents. Documents under the custody of the Court, which are required to be produced in any proceedings in Court, or the officers thereof, will be produced by the proper officer, who will attend on request; but if production is required elsewhere, an order for attendance of the officer must be obtained (*Dan. Ch. Pr.*, pp. 1849, 1850). After the purpose for which the deposit has been made is satisfied, the person who has deposited the documents is entitled to have them delivered out to him.

In Lunacy no one is allowed to inspect documents in the custody of the Court without an order of one of the masters, or a judge. Inspection will not under any circumstances be allowed of the reports made to the Court by its own medical advisers. But, with this exception, liberty to inspect documents will be given to any person who can satisfy the master or judge that he wants it for a reasonable and proper purpose, provided that the lunatic, if living, is not injured thereby (*In re Strachan*, [1895] 1 Ch. 439). The Court will order production of documents in the custody of the master or registrar relating to the estate of a deceased lunatic on the application of a person claiming under him, who has made out a *prima facie* title to the estate (*In re Smyth*, 1880, 15 Ch. D. 286; *In re Strachan*, *ubi supra*).

Contumacy.—This subject is dealt with under DISCIPLINE, ECCLESIASTICAL. See also DE CONTUMACE INSPICIENDO.

Conusance (Connoissance, Cognisance).—This Norman-French term expressed what is now generally expressed by the word "jurisdiction."

A Court is said to have conusance of pleas when it has *exclusive* jurisdiction to hear and determine suits arising between persons resident within its local jurisdiction. Where the jurisdiction is *concurrent* only, the right is merely *tenere placita* (*Vin. Abr.*, "Conusance," A 2).

In Viner's *Abridgment*, "Conusance," M 2, many precedents are given of such claims by corporations possessed of judicial franchises; but with the disuse of local Courts of record these franchises are no longer asserted. Such claim has never been made in this century except by the University of Oxford, usually in respect of actions or minor summary proceedings against resident members over whom it is recognised to have exclusive

civil and criminal jurisdiction by prescription or ancient charter (3 Black. Com. 299, n.), renewed or confirmed by charter of 14 Hen. VIII, 1523, confirmed by statute in 1571 (13 Eliz. c. 29, s. 2). It is limited by judicial decision to cases in which the member of the University is a defendant, and to common law actions not involving a question of freehold (*Ginnett v. Whittingham*, 1886, 16 Q. B. D. 671). The University of Cambridge had a similar franchise, which is now, however, abolished or abandoned. The mode of claim is by motion, to be made without delay to the High Court if that Court is exercising jurisdiction, or where the jurisdiction is asserted by any other Court by application to that Court. The application cannot be made by a party to the proceedings, but only by the authority whose franchises or exclusive rights are infringed. In this respect it differs from privilege to be sued in a particular Court, which can be claimed only by the person sued (Vin. Abr., "Conusance," A 2), and from franchises where the king's writ did not run. In such franchises the defendant could plead to the jurisdiction to the king's writ (Vin. Abr., "Conusance," M 2, 6).

[*Authorities*.—See Vin. Abr., 1751, tit. "Conusance of Pleas"; do. Suppl., 1799, vol. ii. p. 304; 3 Black. Com. 298; 4 do. 276.]

Convenience.—In a contract for the sale of shares in a ship it was agreed that the purchaser should pay interest on the unpaid balance of the purchase-money, and that such balance should be payable in whole or in part at the purchaser's *convenience*, provided the interest should be duly paid. It was held that convenience meant mercantile convenience, and that the vendor, if he paid the interest, was under no obligation to pay the balance of the purchase-money until he was reasonably able to do so (*Crawshaw v. Hornstedt*, 1887, 3 T. L. R. 426).

Balance of Convenience.—As to, in the granting of injunctions to restrain interferences with light, see *Newson v. Pender*, 1884, 27 Ch. D. 43; to restrain the infringement of a patent, see *Société Anonyme, etc. v. Tilghman's, etc., Co.*, 1883, 25 Ch. D. 1; *Plimpton v. Spiller*, 1876, 4 Ch. D. 286.

See INCONVENIENCE; JUST OR CONVENIENT.

Convenient Bridges, passages, etc., under sec. 68 of the Railways Clauses Consolidation Act, 1845 (see *Wilkinson v. Hull, etc., Rwy. Co.*, 1882, 20 Ch. D. 323; *United Land Co. v. Great Eastern Rwy. Co.*, 1879, L. R. 10 Ch. 586).

Any court convenient thereto in sec. 65 of the County Courts Act, 1888, means not any court adjacent thereto, but any court fit or suitable (*Parsons v. Lakenheath School Board*, 1889, 87 L. T. 71; 5 T. L. R. 497).

Convenient Speed.—In trusts for sale where trustees are directed to sell property "with all convenient speed" or "expedition," or "as soon as convenient," the trustees must sell within a reasonable time, i.e., in the case of a will, within a year of the testator's death, unless there are some particular circumstances connected with the market making it advisable to postpone the sale (*In re Davidson, Martin v. Trimmer*, 1879, 11 Ch. D. at p. 348; *Vickers v. Scott*, 1834, 1 Myl. & K. 500). Trustees who do not sell by the end of the year must show some reason for not doing so (*Grayburn v. Clarkson*, 1868, L. R. 3 Ch. 605). But trustees have a

discretion, and if in the *bond fide* exercise of a reasonable discretion they delay to sell, and the delay results in loss to the estate, the trustees are not liable for the loss (*Buxton v. Buxton*, 1835, 1 Myl. & Cr. 80; *Garrett v. Noble*, 1834, 6 Sim. 504); but trustees will be liable for loss caused by unreasonable delay, as in *Fry v. Fry*, 1859, 28 L. J. Ch. 59. When trustees are directed to sell with all convenient speed and within a named period, *e.g.* five years, the expression as to the period is directory, and the trustees may sell after the expiration of the period (*Pearce v. Gardner*, 1852, 10 Hare, 287).

A clause in a charter-party that a ship should *with all convenient speed* proceed to a certain port, and there load, is a stipulation and not a condition precedent, except where delay in proceeding entirely defeats the object of the freighters in taking up the ship (*MacAndrew v. Chapple*, 1866, L. R. 1 C. P. 643).

Convenient Time.—Where there is a covenant in the lease of a house that it should be lawful for the landlord at convenient times in the daytime to enter the house to see the state of its repair, the landlord ought to give notice that he is coming, and, if he goes without giving notice, the time of his visit is not to be considered a convenient time, and there is no breach of the covenant if, in such circumstances, he is refused permission to see parts of the house (per Denman, C.J., *Doc d. Wetherell v. Bird*, 1833, 6 Car. & P. at p. 200).

Convenient Way.—When there was a grant of a “convenient way” in, through, etc., a piece of land, with liberty to make and lay causeways, and to use the same with carts, waggons, etc., and to carry coals, etc., it was held that this grant gave the right to make any such way (*e.g.* a “framed waggon way”) as was necessary for carrying coals, etc. (*Senhouse v. Christian*, 1787, 1 T. R. 560; 1 R. R. 300).

Convent.—The word convent signifies a place set apart for the habitation of persons leading a religious life. It is more generally perhaps used in relation to the habitations of women devoted to a religious life than of men. (As to the legal status of such institutions, past and present, see ABBEY; as to the position of Roman Catholic Convents, see ROMAN CATHOLIC CHURCH IN ENGLAND.)

Conventicle Act was one of a series of statutes of the reign of Charles II. directed against nonconformity. The Act usually known as the Conventicle Act was the statute of 1670, 22 Car. II. c. 1, entitled an Act to prevent and suppress seditious conventicles, which enacts that if any person of the age of sixteen years or upwards, being a subject of the realm, is present at any assembly, conventicle, or meeting, under colour or pretence of any exercise of religion in other manner than according to the liturgy and practice of the Church of England, at which there are five persons or more assembled together, exclusive of the household, such person is liable to the penalty of a fine of five shillings for the first offence, and a fine of ten shillings for further offences (ss. 1 and 2). Any person preaching in a conventicle is made liable to a fine of twenty pounds for the

first offence, and forty pounds for further offences (s. 3), and any person who knowingly allows any conventicle to be held in his house, outhouse, yard, etc., is liable on conviction to a fine of twenty pounds (s. 4). Justices, constables, etc., are empowered to break open and enter any house to enforce the Act, and the assembly must be dispersed, by force if necessary (s. 9). Other statutes of the same period were also aimed at the suppression of conventicles (see 16 Car. II. c. 4, 1664, and 17 Car. II. c. 2, 1665; see also 31 Eliz. c. 1, s. 1). These penal statutes against nonconformity were temporarily suspended by the Declaration of Indulgence in 1672, which was withdrawn in the following year, and by the Declaration of Indulgence issued by James II. in 1687 (see the Toleration Act, 1689, 1 Will & Mary, c. 18).

The Conventicle Act was repealed by the Places of Religious Worship Act, 1812, 52 Geo. III. c. 155, which provided for the registration of places of religious worship (see now the Places of Worship Registration Act, 1855, 18 & 19 Vict. c. 81; 52 Geo. III. c. 155 is now repealed by the Statute Law Revision Act, 1873, 36 & 37 Vict. c. 91).

The term conventicle (Lat. *conventiculum*) in its classic sense denotes any meeting or assembly, but it has more frequently been used in an opprobrious sense in reference to private or clandestine meetings, first of a civil or political, and afterwards of a religious character. Although the ecclesiastical application arose directly out of the political, and was never thoroughly distinct from it in English law, it was in common use largely affected also by the mediæval association with meetings of sectaries or heretics (see Murray, *Eng. Hist. Dict.* vol. ii. p. 936; Fuller, *Church Hist.* (1655), bk. ix. s. iii. 4). The term appears to have been applied to the Wycliffite assemblies (temp. Edw. III. and Rich. II.), and to private assemblies for the exercise of religion otherwise than as sanctioned by law; in this sense it was used in statutes of Henry IV. and Henry V. in 1401 and 1414; it was subsequently applied to meetings for religious worship of nonconformists or dissenters from the Established Church of England during the period when such meetings were prohibited by law (see 35 Eliz. c. 1, and 10 Anne, c. 6). In Scotch history the word conventicle is associated with the field preaching of the Presbyterian ministers during the reigns of Charles II. and James II., which was frequently attended by large numbers of armed men (see Burnet, *Hist. Own Time*, 2nd ed., 1833, vol. i. bk. ii. p. 534; see also **DISSENTER**; **NONCONFORMIST**).

[*Authorities.*—See *Observations upon the Conventicle Act*, by Sir Edmund Saunders, C.J., 1685; *Queries upon the Act against Conventicles*, Tract, 1670; Burn, *Ecclesiastical Law*, 9th ed., 1842, tit. "Dissenters"; Collier, *Ecclesiastical Hist.*, 1846 ed., vol. viii.; Hallam, *Const. Hist.* vol. ii. ch. xi.; Comyn, *Digest*, vol. iv., tit. "Justices of the Peace," B. 16.]

Conventional Estates.—Estates for life expressly created by direct limitation as distinguished from *legal* estates for life created by operation of law, of which latter class tenancy by the curtesy (*q.v.*) may be given as an instance (2 Black. *Com.* 120 *et seq.*).

Conversion, Action of.—This was originally an action of trespass on the case (see **ACTION ON THE CASE**) for the recovery of damages against a person who had found goods and refused to deliver them up on demand to the owner, and converted them to his own use (1 Chitty on

Pleading, 7th ed., p. 163). Formerly it was called "Trover," from the French *trouver*, to find, owing to the fact that the declaration contained an express averment that the defendant had found the goods (*ibid.*; 2 *ibid.* p. 640; Stephen on *Pleading*, 7th ed., pp. 14, note x, 385). This form of action was subsequently extended to all conversions of goods, and the averment of the finding, having thereby become in most cases fictitious and needless, was abolished by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 49), and since then the name of "Trover" has been practically superseded by that of "Conversion" (see C. L. P. Act, 1852, Sched. B. 28; R. S. C., 1883, App. C., s. vi. No. 1).

To constitute a conversion there must be a wrongful taking or using or destroying of the goods, or an exercise of dominion over them inconsistent with the title of the owner (2 Wms. Saund., 1871 ed., p. 108; Bullen and Leake, 5th ed., p. 382). The action is confined to the conversion of goods or personal chattels (1 Chitty on *Pleading*, 7th ed., p. 164; 2 Selwyn's N. P., 13th ed., p. 1291). It will not lie for things annexed to the freehold, as, for instance, for fixtures (*Davis v. Jones*, 1818, 2 Barn. & Ald. 165; 20 R. R. 396), but if fixtures have been severed from the freehold, and have been afterwards wrongfully taken away, an action for conversion may be supported (*Sheen v. Rickie*, 1839, 5 Mee. & W. 175). Nor will conversion lie for the wrongful using of a sum of money, unless the action is brought in respect of specific coins which can be identified (*Orton v. Butler*, 1822, 5 Barn. & Ald. 652).

In order to succeed in this action the plaintiff must, at the time of the conversion, have had either an *absolute* or a *special* property in the goods, coupled with possession or the right of immediate possession thereof (1 Chitty on *Pleading*, 7th ed., p. 166). *Absolute property* is where a person, having the possession of goods, has also the exclusive right to enjoy them, and which can only be defeated by his own act (*Webb v. Fox*, 1797, 7 T. R. 391, 398; 4 R. R. 472; 2 Selwyn's N. P., 13th ed., p. 1276). Thus, an owner who is either in actual possession of goods, or entitled to the immediate possession thereof, can maintain this action for a conversion of the goods; but an owner of goods who has let them to another for a certain term cannot bring this form of action in respect of any conversion of the goods during the term (*Gordon v. Harper*, 1796, 7 T. R. 9; 4 R. R. 369). *Special property* is where he who has the possession of goods holds them subject to the claims of other persons (*Webb v. Fox*, *supra*; 2 Selwyn's N. P., 13th ed., p. 1286). For instance, a carrier has a special property in the goods intrusted to him for carriage, and he may bring an action for conversion against a stranger who takes them out of his possession (1 Rol. Abr. 4 (1), pl. 1; *Arnold v. Jefferson*, 1697, 1 Raym. (Ld.) 276; Buller's N. P. 33; 2 Wms. Saund., 1871 ed., p. 94).

The measure of damages in an action for conversion is the actual loss sustained by the wrongful act (*Johnson v. Lanc. and York. Railway Co.*, 1878, 3 C. P. D. 499). In general, this would be the market value of the goods at the time of conversion (*ibid.*; *Mulliner v. Florence*, 1878, 3 Q. B. D. 484; 47 L. J. Ex. 700; *Henderson v. Williams*, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308). Where, however, the plaintiff has only a special property in the goods, the damages recoverable in respect of a conversion of them by the actual owner would be measured by the limited character of the plaintiff's interest in the goods (*Brierly v. Kendall*, 1852, 17 Q. B. 937); but if the conversion is by a stranger, the plaintiff is entitled to the full value of the goods, notwithstanding the limited nature of his interest (*ibid.*; *Johnson v. Lanc. and York. Railway Co.*, *supra*). By 3 & 4 Will. IV. c. 42, s. 29, the jury on the trial of an action for conversion may also give

damages in the nature of interest over and above the value of the goods converted.

An action for conversion must be commenced within six years next after the cause of such action (see 21 Jac. I. c. 16, s. 3).

[*Authorities*.—See further Bullen and Leake, 5th ed., pp. 382, 866.]

Conversion of Property.—The law of England recognises two distinct lines of devolution of property, according to the nature of that property. If it is real estate, it goes to the owner's heir-at-law; if it is personal estate, it goes to the owner's next-of-kin. But this devolution is subject to the disposing power of the owner. The owner has the dominion, and may determine on which line the property shall devolve, that is, he may impress it with the qualities and incidents of real estate or of personal estate at his option: he may declare that money shall be land or land money, and to the extent to which he has done so the law respects the declaration of his wish. This, put shortly, is the doctrine of conversion. The ground of the doctrine of conversion is the familiar principle of equity, which treats that as done which ought to be done, and was first formulated with precision by Sir Thomas Sewell, M. R., in *Fletcher v. Ashburner*, 1779, 1 Bro. C. C. 497.

Conversion of Land into Money by Contract or Will.—The simplest and most familiar case of conversion of land by contract is by contract for sale. From the date of the contract the vendor becomes in equity a trustee of the estate for the purchaser, and the purchaser a trustee of the purchase money for the vendor (*Pollexfen v. Moore*, 1745, 3 Atk. 272). The simplest and most familiar case of conversion by will is a devise of land to trustees upon trust for sale. The land so devised is then by constructive conversion money, and as such it will pass under a general residuary bequest of personal estate (*Farrer v. Earl of Winberton*, 1842, 5 Beav. 1); in case of intestacy it will go to the personal representatives (*Ashby v. Palmer*, 1816, 1 Mer. 296); legacy duty is payable in respect of it (*Adv.-Gen. v. Smith*, 1854, 1 Macq. H. L. 760), and probate duty (*In re Goods of Jane Barden*, 1837, L. R. 1 P. & M. 325); and so complete is the conversion that an alien, though he could not under the old law hold land in England, was still held entitled to the proceeds of the sale of land devised to trustees to sell for his benefit (*De Hourmelin v. Sheldon*, 1837, 1 Beav. 79; affirmed 4 Myl. & Cr. 525).

What Words will Work a Conversion.—The consequences of conversion being so serious—altering entirely the devolution of property—it is a settled rule of equity that the direction to convert must be imperative, not optional, or in the nature of a mere authority (*Amler v. Amler*, 1798, 3 Ves. 582 a). "The Court," as Lord Hardwicke said, "never admits trustees to have an election to change the right unless it is expressly given them" (*Earlom v. Saunders*, 1754, Amb. 240). Hence, if a mere power to convert is given (*De Beauvoir v. De Beauvoir*, 1850, 3 H. L. 524; *Pitman v. Pitman*, [1892] 1 Ch. 279), or a mere option (*Curling v. Mag*, cited; *Guidot v. Guidot*, 1742, 3 Atk. 255; *Bourne v. Bourne*, 1842, 2 Hare, 35), there is no conversion; but an apparent option, as where trustees are to lay out money in land or some other securities, as they think most fit and proper, may yet be construed as an imperative direction if the limitations directed are limitations applicable only to real estate (*Cowley v. Hartstonge*, 1813, 1 Dow. H. L. 361; 14 R. R. 86; *Earlom v. Saunders*, *supra*). Again, conversion may be directed with some qualification, as "with consent," "upon request," or "after request." Thus where trustees

had a power with the consent of a person in possession of settled estates to lay out money in land to be settled to the same uses, it was held an absolute conversion (*De Beauvoir v. De Beauvoir*, *supra*). In *Davies v. Goodhew*, 1834, 6 Sim. 585, where money was directed to be invested in land with consent, and not without, it was held that there was no conversion until consent given. If the consent in such cases is withheld from interested or improper motives, equity will, of course, not allow such conduct to avail the wrongdoer (*Lord v. Wightwick*, 1853, 4 De G., M. & G. 803). The conversion being directed "after request" of a certain person, will not prevent it being imperative (*Thornton v. Hawley*, 1804, 10 Ves. 127; and see *In re Taylor's Settlement*, 1852, 9 Hare, 596). Mortgages follow the same principle. The object of a mortgage is to raise money, not to alter the character of the property or its devolution—as the proviso for reconveyance evinces—and therefore if the power of sale is exercised after the mortgagor's death, the surplus proceeds will belong to his devisee or heir-at-law, as the case really be (*Bourne v. Bourne*, 1842, 2 Hare, 35). A mere notice to treat given by a railway company to an owner will not operate as a conversion of the land into personalty; but as soon as the contract is complete by the company, and the landowners agree on the price, or its ascertainment by arbitration or verdict, conversion takes place (*Metropolitan Ry. Co. v. Woodhouse*, 1864, 13 W. R. 516; *Harding v. Metropolitan Ry. Co.*, 1871, L. R. 7 Ch. 154), provided, that is, the owner is a person *sui juris*. If land of an infant is taken compulsorily under the Lands Clauses Act, 1845, there is no conversion (*Kelland v. Fulford*, 1877, 6 Ch. D. 491); nor is there where the land taken is the land of a person of unsound mind not so found by inquisition (*In re Tugwell*, 1884, 27 Ch. D. 309; but see *Ex parte Flamank*, 1851, 1 Sim. N. S. 260).

Conversion by Administration.—Conversion is not confined to cases of intention like the foregoing. It may be the result of administration by the Court. A debtor's real estate may be sold in bankruptcy, for instance. It is then converted, and the bankrupt's heir-at-law will not be entitled to any part of it, albeit not required for payment of debts (*Banks v. Scott*, 1821, 5 Mad. 493); but if sold after the bankrupt's death it is only converted to the extent necessary to satisfy creditors.

In administering a lunatic's property the Court acts with a single eye to the interest of the lunatic himself. It shuts out of its view all consideration of eventual interests, and considers only the immediate interest of the person under its care; see *A.-G. v. Marquis of Ailesbury*, 1887, 12 App. Cas. 672.

In the case of infants, the general rule of the Court is that no conversion of the infant's property from one species to another can be allowed; but this is subject to the regard which the Court, standing *in loco parentis*, pays to the benefit of an infant as it does of a lunatic, and therefore where it is for the infant's benefit the Court will elect for him (*Robinson v. Robinson*, 1854, 19 Beav. 494). Under the Partition Acts the same policy is preserved (*Foster v. Foster*, 1875, 1 Ch. D. 588).

Money Agreed or Directed to be Laid Out in Land.—This is the converse case, and by analogy the money agreed or directed to be laid out in the purchase of land will in equity pass under a general devise of land or descend to the heir (*Biddulph v. Biddulph*, 1806, 12 Ves. 161; *Green v. Stephens*, 1810, 17 Ves. 177); nor is it any the less notionally land that there is a direction for investment until a purchase can be found (*Edwards v. Warrick, Counties of*, 1723, 2 P. Wms. 171). It is liable to curtesy where the owner is a married woman, and to dower where the owner is a husband

(3 & 4 Will. iv. c. 105, s. 2). It will also now, since the Intestates Estates Act, 1884, ss. 4, 7, escheat to the Crown. Where a person contracts to purchase land and dies before completion, neither his devisee (30 & 31 Vict. c. 69, amending Locke King's Act, 1854) nor his heir-at-law (40 & 41 Vict. c. 34) is entitled to have the unpaid purchase money made good from the deceased's personal estate.

Date of Conversion.—Where conversion is absolute it dates, in case of a deed, from the delivery of the deed; in case of a will, from the death of the testator; in other words, from the date at which each instrument speaks. A direction for conversion may, however, not be absolute. It may be conditional or contingent. An owner of land may demise it, as in *Lawes v. Bennett*, 1785, 1 Cox, 167, for a term of years, with an option of purchase by the lessee at the expiration of that of the term. In such a case when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, with the difference only that the real estate is converted into personal at the deferred date. Until, however, the option is exercised, the rents belong to the heir or devisee (*Townley v. Bedwell*, 1808, 14 Ves. 591; 9 R. R. 352; *Ex parte Hardy*, 1861, 30 Beav. 206; see also *Reynold v. Arnold*, 1875, L. R. 10 Ch. 386).

Total or Partial Failure of Purposes.—It not unfrequently happens that the purposes for which a testator has directed real estate to be sold or money to be laid out in land fail either wholly or partially. If they fail wholly, if, for instance, at the moment when a grantor puts his hand to a deed giving the proceeds of land to a purpose which the policy of the Statutes of Mortmain that instant avoids, the case is the same as if no conversion had been directed, the property is "at home" (*Clarke v. Franklin*, 1858, 4 Kay & J. 257, 265); and this is so whether the conversion is one of land into money or money into land, and whether directed by will or by deed.

Partial Failure—Under Will.—(a) *Land Directed to be Sold.*—In this case the undisposed of beneficial interest will result to the testator's heir-at-law, and will not go to his next-of-kin, notwithstanding that the land may have been actually converted into money; for the heir-at-law is by the law of England entitled to every interest in land not disposed of by his ancestor, and the Court will not infer an intention to convert the estate for any other purpose than the particular one expressed (*Hill v. Cock*, 1 Ves. & Bea. 175). The above proposition was established in *Ackroyd v. Smithson*, 1780, 1 Bro. C. C. 503, memorable for the celebrated argument of young John Scott, afterwards Lord Eldon; and so strong is the leaning in favour of the heir-at-law that even an express direction that the proceeds of the sale of real estate shall be deemed personality will not prevent the operation of the rule (*Collins v. Wakeman*, 1795, 2 Ves. Jun. 683; *Flint v. Warren*, 1845, 14 Sim. 554); but though the heir-at-law of such undisposed of residue he takes it, if a sale of the lands is necessary for the purposes of the trust as money and not as land (*Smith v. Claxton*, 1819, 4 Mad. 484, 492). It makes no difference how the failure is caused, whether by lapse or by reason of the illegality of the purpose, or its being obnoxious to the rules against perpetuities or accumulation under the Thellusson Act (*Eyre v. Marsden*, 1838, 2 Kee. 564) or under the Statutes of Mortmain (*A.-G. v. Lord Weymouth*, 1743, Amb. 19).

(b) *Money Directed to be Laid Out in Land.*—In this case on a partial failure of purposes the next-of-kin take the undisposed of surplus money (*Cogan v. Stephens*, 1 Beav. 482 n.), and take it according to its actual

condition at the date of devolution (*Curteis v. Wormald*, 1878, 10 Ch. D. 172; *Reynolds v. Godlee*, 1859, John. 536, 582).

Where Conversion Agreed or Directed by Deed.—In this case if there is a partial failure, the property, so far as undisposed of, results to the settlor in its converted state (*Griffith v. Ricketts*, 1849, 7 Hare, 299).

See also RECONVERSION.

[*Authorities.*—White and Tudor, *L. Cas. in Eq.*, 6th ed., pp. 968–1057; Lewin on *Trusts*, 9th ed., 1071; Watson, *Compendium of Equity*, 2nd ed., 105; Snell, *Principles of Equity*, 10th ed., 216–242; A. H. Smith, *Principles of Equity*, 2nd ed., 450; Smith, *Compendium of Real and Personal Property*, 6th ed., 1370; Jarman, *W.*, 5th ed., 592; Seton, *D.*, 5th ed., 1306.]

Conveyancing Acts.—The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), supplemented by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), and the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), and preceded by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), has had a large operation in shortening conveyances, in simplifying titles, and in lessening the cost and labour of conveyancing.

Previously to those Acts, contracts for the sale, mortgage, or leasing of land contained elaborate provisions for guarding the owner against burdensome and vexatious requirements; deeds of conveyance contained, after the description of the land dealt with, a long enumeration of every possible thing upon it, or right in or connected with it which was intended to pass with the land, and finished with lengthy covenants for title; while wills and marriage settlements contained long provisions enabling trustees to apply the income of the property of infants for their maintenance, and to manage their estates during their infancy. These and similar provisions are now by the above-mentioned Acts implied or enabled to be implied, instead of being expressed, and they are consequently unnecessary, and are in practice generally omitted. At the same time, other important changes in the law of real property have been made which will be referred to. Perhaps the most important provision of the Act of 1881—a provision which was wanting in previous Acts having like objects, and which probably has largely contributed to its success—is that solicitors may in all cases adopt the Act without being liable for doing so.

The Vendor and Purchaser Act, 1874, shortens the period for which title has to be deduced from sixty to forty years; it relieves the lessor or assignor of a term from the necessity of proving the title to the freehold; it makes recitals in deeds twenty years old *prima facie* evidence of the truth of the statements contained in them; it restricts the duties of a vendor with regard to furnishing covenants to produce documents of title; and it makes provision for vendors and purchasers obtaining by application in a summary way to a judge in chambers, a decision upon matters in dispute between them.

The Conveyancing Act, 1881, is divided into parts, with separate titles, which it will be convenient to follow in giving the more important provisions:—(1) *Preliminary.*—This contains definitions. (2) *Sales and other Transactions.*—A purchaser of enfranchised copyhold land cannot call for the title of the lord granting the enfranchisement. A document dated prior to the period fixed for the commencement of title cannot be required to be produced or abstracted, although creating a power subsequently exercised, or although subsequently recited. The receipt for the last payment of rent is, as regards a purchaser of the lease, *prima facie* evidence of the performance

of the covenants. The expense of producing documents, and of procuring information and copies of documents not in the possession of the vendor, is thrown upon the purchaser. The Court may direct land subject to an incumbrance to be sold free from it, upon a sufficient sum to cover the incumbrance being paid into Court. A conveyance of land, or of land with buildings upon it, or of a manor, is made to include (respectively) all the matters, things, and rights mentioned in the Act, being those usually enumerated in a conveyance in the general words after the description of parcels of that nature (as the case may be). In a conveyance the usual covenants for title are implied where a statement is made of the character in which the party conveys. Thus where the grantor is expressed to convey as "beneficial owner," as "trustee," or as "mortgagee," or as "mortgagor," the covenants usually entered into by the party are implied according as the transaction is one of sale or mortgage, and as the estate is freehold or leasehold. But in the case of a settlement, the person conveying "as settlor" is implied to covenant for further assurance only, and not for all the usual vendor's covenants, as was the former practice. (3) As regard production and safe custody of *title-deeds*, the old covenants are rendered unnecessary, as their effect is now obtained by an acknowledgment in writing by the vendor retaining the deeds of the right of the purchaser to their production, and by an undertaking in writing for their safe custody. These generally form one document, and are stamped with a sixpenny stamp. (4) *Leases*.—Both the benefit of covenants by the lessee, and of conditions of re-entry, and the burdens of covenants by the lessor are made to run with the reversion, notwithstanding its severance, thus considerably extending the Act 32 Hen. VIII. c. 34. Likewise conditions of re-entry are made apporportionable upon severance of the reversion. The exercise of rights of re-entry and forfeiture are, with the exception of conditions against assigning or parting with the possession, and for, in a mining lease, inspecting books, made subject to various conditions in favour of the lessee. This last provision has been extended by the Conveyancing Act, 1892. (5) *Mortgages*.—A mortgagor may require the mortgagee, instead of reconveying, to transfer to a third person; he may inspect and copy the title-deeds held by the mortgagee; and both he and also the mortgagee while in possession may make an agricultural lease for twenty-one, or a building lease for ninety-nine years; he may have a sale instead of redemption. A mortgagee under a deed is given a power of sale upon default; he may insure premises against fire; may, upon default, appoint a receiver; while in possession may cut timber; may have sale instead of foreclosure. (6) *Statutory Mortgage*.—Where a mortgage is by deed and expressed to be by way of statutory mortgage, and is in the short form prescribed, it is implied to contain a covenant for payment of debt and interest, and a proviso for reconveyance of the ordinary kind. There are like provisions as to implication of clauses in transfers and reconveyances of statutory mortgages. (7) *Trust and Mortgage Estates on Death*.—These estates, if vested in one person solely, are made at his death, and notwithstanding his testamentary disposition, to pass to his personal representatives as chattels real. By the Copyhold Act, 1894, s. 83, re-enacting the Copyhold Act, 1887, s. 43, these provisions are not to apply to copyhold estates vested in a tenant on the rolls. (8) *Trustees and Executors*.—Ample powers of appointing new trustees in all needful cases are given, and an entirely new power is given to the appointor of vesting the trust property in the new trustees by a declaration to that effect in the deed of appointment, thus rendering a conveyance by the former trustees unnecessary. But this power does not extend to copyholds. Full

powers of sale (in the case of a trust for sale), of giving receipts, of compounding claims, are given to trustees, and in the last case to executors also. All these provisions, as far as they affect trustees, are repealed and re-enacted by the Trustee Act, 1893, which at the same time embodies the amendments made by the Conveyancing Acts, 1882, s. 5, and 1892, s. 6.

(9) *Married Women*.—A new power is given the Court of removing the restraint on anticipation upon a married woman, with her consent, where it appears to be for her benefit. (10) Powers are given to the trustees or other persons mentioned to apply the income of the property of infants for their maintenance and benefit, and to superintend and manage their property during their infancy. (11) *Rent Charges and other Annual Sums*.—The ordinary remedy of distress upon non-payment for twenty-one days, and of entry upon non-payment for forty days, is given in respect of any annual sum charged upon land. Power is also given to demise the land in the like case. Provision is also made for the owner of land subject to a rent or sum of this nature to commute it by payment of an amount to be fixed by the Copyhold Commissioners. (12) *Powers of Attorney*.—The donee of the power may execute deeds in his own name. Persons paying money or acting under the power in good faith, and without notice of the death or incapacity of, or revocation by the donor, are not to be liable therefor. (13) *Construction and Effect of Deeds and other Instruments*.—The use of the word "grant" is no longer necessary to convey land. Land may be conveyed by a person to himself jointly with another, and by husbands or wives to each other. The words "fee simple" or "fee tail" may be used in deeds by way of limitation. Powers collateral may be released. A deed expressed to be supplemental to another is to be construed as if indorsed thereon. A receipt for money in the deed is sufficient discharge, although not also indorsed. And if either in the deed or indorsed on it, it discharges a subsequent purchaser without notice of non-payment. The production by a solicitor of a deed with a receipt within or upon it authorises payment to him. This authority has been extended by the Trustee Act, 1893, s. 17 (4), to the case where the vendors are trustees. Covenants are to be deemed as made with the covenantor, his heirs and assigns, or his executors, administrators, or assigns, according as they relate to lands of inheritance, or lands not of inheritance. Covenants generally are to bind the heirs, and, when made jointly are to bind survivors. Money expressed in a mortgage to be advanced on a joint account is to be due to the mortgagees as on a joint account. This provision obviates the joint account clauses, where trustees lend on mortgage. Easements may be granted by way of use. A conveyance shall pass all the estate, etc. (following the ordinary estate clause) of the party conveying. (14) *Long Terms*.—Provision is made for enabling owners of terms of three hundred years having two hundred years unexpired to enlarge them into fee-simple estates. Terms subject to determination by re-entry are excepted from this provision by the Conveyancing Act, 1882, s. 11. (15) *Adoption of the Act*.—All the covenants and provisions of the Act are to be deemed proper ones, and solicitors are not to be in any way liable, even when acting for trustees, for adopting or relying on them.

The sections as to the rights of vendors and purchasers under their contract; those implying "general words," covenants for title, and rights as to production and custody of title-deeds; those giving power of leasing, of sale, of insurance, of appointing receivers, and of felling timber under mortgage deeds; those relating to the appointment of new trustees, to trustees selling, and applying income and managing property of infants, to enforcement of

rent charges, to the effect of covenants, to advances on joint accounts, to the "all the estate" clause, apply only if and so far as a contrary intention is not expressed in the document. The sections as to rights of mortgagor against mortgagee, and as to forfeiture under leases, are to apply notwithstanding a stipulation to the contrary.

The Conveyancing Act, 1882, provides for an official search being made on behalf of purchasers of entries of all judgments and others kept at the Central Office of the Royal Courts, and enables purchasers to rely on the certificate furnished by the officer. It restricts constructive notice in favour of a purchaser, enables the donee of a power to disclaim it in all cases, enables a power of attorney given for value to be made irrevocable in favour of a purchaser, and if not given for value to be made irrevocable for one year. It also contains a provision enabling separate sets of trustees to be appointed when the trusts are distinct, which has been re-enacted with slight alterations by the Conveyancing Act, 1892, and later by the Trustee Act, 1893.

The Conveyancing Act, 1892, amends the previous Acts, but does not affect the above description except as stated.

These important Acts have been generally adopted in almost every particular, and with admittedly beneficial results, and notwithstanding the length of time which has now elapsed since their dates, no serious defect has appeared, and, considering their wide adoption and application, the amount of litigation their provisions have given rise to has been small.

[*Authorities.*—See Hood and Challis, *Conveyancing Acts*; and works cited in, and at the end of, the Article CONVEYANCING PRACTICE.]

Conveyancing Counsel of the Court.—By sec. 41 of the Master in Chancery Abolition Act, 1852 (15 & 16 Vict. c. 80), the Lord Chancellor is empowered to nominate any number of conveyancing counsel in practice, not less than six, who shall have practised as such for ten years at least, to be the conveyancing counsel upon whose opinion the Court may act in the cases specified in sec. 40 of the above-mentioned Act; to supply vacancies in the list from time to time; and to distribute the business among such counsel in such order and manner as to the Lord Chancellor shall seem fit.

The functions of the conveyancing counsel are now defined by R. S. C., 1883, Order 51, r. 7, which is taken from sec. 40 of the Master in Chancery Abolition Act, 1852. By this rule the Court or a judge may refer to the conveyancing counsel of the Court any matter relating to the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof, or to the settlement of a draft of a conveyance, mortgage, settlement, or other instrument, or any other matter which the Court or judge may think fit to refer, and may receive and act upon the opinion given in the matter referred. By Order 51, r. 2 (taken from sec. 56 of the Chancery Amendment Act, 1852 (15 & 16 Vict. c. 86)), it is provided that, before any estate or interest is put up for sale under a judgment or order, an abstract of the title thereto is, unless otherwise ordered, to be laid before some conveyancing counsel approved by the Court for his opinion thereon, to enable proper directions to be given respecting the conditions of sale, and other matters connected with the sale. It was held under the old practice that the section conferring the power was not obligatory, but that the Court had a discretion to dispense with a reference to the

conveyancing counsel (*Gibson v. Woollard*, 1854, 5 De G., M. & G. 835). In practice the Court occasionally acts upon the opinion of an ordinary counsel, and does not insist on a reference to one of the conveyancing counsel, but, as a rule, it will require the papers to be submitted to the conveyancing counsel. It is usual to refer to such counsel deeds for the reinvestment of the moneys of incapacitated persons (*Blaxland v. Blaxland*, 1853, 9 Hare, App. 68).

Any party objecting to the opinion given by the conveyancing counsel is entitled to have the point in dispute disposed of by the judge (Order 51, r. 8).

The business to be referred to the conveyancing counsel is distributed amongst them in rotation in the prescribed manner. In case of illness of the conveyancing counsel or other inability on his part to accept the reference, the same is offered to the others in seniority. A reference may be directed to one in particular of the conveyancing counsel (Order 51, rr. 9-13, reproducing Order 2, rr. 1-5 of the Chancery Consolidated Orders).

The fees of the conveyancing counsel are regulated by the taxing officers, subject to appeal to the Court or judge, whose decision is final (Order 65, r. 27 (36)), taken from sec. 43 of the Master in Chancery Abolition Act, 1852; and see *Rumsey v. Rumsey*, 1855, 21 Beav. 40). Where in pursuance of any direction by the Court or a judge drafts are settled by any of the conveyancing counsel of the Court, the expense of procuring such drafts to be previously or subsequently settled by other counsel on behalf of the same parties will not, as a rule, be allowed on taxation (Order 65, r. 22, reproducing C. Order 40, r. 30; and see *Nicholson v. Jeyes*, 1853, 1 Sm. & G. App. 13).

[*Authorities*.—*Dan. Ch. Pr.*, 6th ed., pp. 962, 963, 1076; *Annual Practice*, 1897, pp. 941, 944-946, 1153.]

Conveyancing Practice.—Conveyancing is the art of transferring legal rights to property from one person to another by means of documents. It is largely occupied with the preparation of conveyances on sales of land, of mortgages, and of marriage settlements. Speaking more generally, it relates to all documents of a non-contentious character affecting proprietary rights, such as wills, partnership deeds, deeds of appointment, disentailing deeds, and others of a like nature. In the preparation of these documents, and especially where the transaction is between parties having opposing interests, a settled practice is followed by the solicitors concerned. This practice has arisen from its mutual convenience, and has become recognised by judicial decision. The case of a sale of land may be taken as a typical example.

Sale of Land.—Notwithstanding recent legislation, it is found desirable further to protect the vendor. For this purpose the contract of sale usually further limits the period during which title must be deduced, perhaps to twenty or fifteen years. It provides that objections shall not be made on account of the possibility of persons being alive who are reasonably certain not to exist, or on account of defects in the description of the parcels, or otherwise. It also provides for the payment or apportionment of outgoings up to the date of completion, and for the payment of interest upon the purchase-money, if the completion is for any reason delayed. In the case of sales by auction, power is reserved to the vendors to rescind the contract upon the purchaser insisting upon any requisition with which the vendor is unwilling to comply (see COND-

TIONS OF SALE). This last clause is sometimes resisted by purchasers by private treaty. Immediately after the signature of the agreement, the vendor's solicitor forwards to the purchaser's solicitor an abstract of his title (see ABSTRACT OF TITLE). It is written with ordinary conveyancing abbreviations, on brief paper, and with various margins, to the number of four, used according to the various parts of the deed abstracted, the names and descriptions of the parties being written on the widest lines and the parcels on the narrowest. These differences of margin enable the practitioner to see at a glance the part of the deed he may wish to refer to. Upon receipt of the abstract, the solicitor proceeds to verify and peruse it. The practice as to which of these things is done first is not invariable. For verifying the abstract he makes an appointment with the vendor's solicitor to see the deeds, usually at the office of the latter. He then compares the abstract carefully with the deeds. Having verified, the purchaser's solicitor proceeds to peruse the abstract (or sends it to counsel for perusal) for the purpose of seeing whether or not a good title is shown.

After perusal, the purchaser's solicitor prepares the requisitions and objections upon the title, including a list of the deeds he expects to be handed over to him or acknowledged upon completion (see REQUISITIONS ON TITLE). These requisitions must be delivered to the vendor's solicitor strictly within the time fixed by the contract, unless the latter grants an extension of the time. The vendor's solicitor then writes his replies. Upon receiving them the purchaser's solicitor may either accept them as sufficient, or further insist upon any requisition or objection he considers not complied with or removed. When all the requisitions have been satisfied or waived, and after having searched the official registers against charges, *lites pendentes*, etc., he proceeds to the preparation of the conveyance. After having settled his draft, he has it fair copied upon wide ruled draft paper and sent to the vendor's solicitor for approval. This latter makes in red ink any alterations which he thinks necessary for the safety of his client, but otherwise accepts it, as the form of the draft is at the election of the purchaser. The vendor usually takes this opportunity of sending the draft to the solicitors of any other persons who have been made parties to the conveyance, and whose concurrence he must obtain, for their perusal and approval.

When the vendor owns other property which is held under a common title with the property sold he retains the title-deeds common to the two, and where parts of property held under a common title are contemporaneously sold to different purchasers the purchaser of the highest value is entitled to have the title-deeds. In these cases the vendor or other purchaser, as the case may be, gives a written acknowledgment of the right of the purchaser to the production of these deeds, and an undertaking for their safe custody. This acknowledgment and undertaking is perused by the vendors and settled in the same way as the conveyance, and when engrossed is forwarded with it for execution. The vendor's solicitor having obtained the execution of the conveyance and of the acknowledgment (if any) by all necessary parties, an appointment is made for completion, which usually takes place at his office. The purchaser's solicitor attends there with the abstract. He examines the conveyance and undertaking (if any) to see that all is in order, checks the title-deeds proposed to be handed over with the abstract to see that all that he has a claim to are there, and pays what upon the balance of accounts appears as owing by his client for purchase-money and interest, etc. Formerly where the vendor was not

present the purchaser's money was usually paid into the bank of the vendor, so as to ensure that it reached the persons entitled to receive it. But now since the Conveyancing Act, 1881, and the Trustee Act, 1893, purchase-money may be safely paid to the vendor's solicitor, even where the vendors are trustees. The purchaser takes the conveyance and the title-deeds and the acknowledgment (if any), and the transaction is complete, with the exception of the stamps upon the deed. These will be affixed by the Inland Revenue authorities at any time within one month after execution, and this course is usually taken to avoid the trouble of getting the unused stamp allowed for in case the prepared deed has for any reason to be discarded before execution. Each party has to bear his own costs in the matter unless otherwise stipulated for, which is rarely done, or except as to attested copies of deeds not in his possession furnished by the vendor, or other acts done by him not required by law. Of course the expense of obtaining the execution of all parties who are necessary to complete the conveyance must be borne by the vendor.

The above is the usual course in an ordinary sale of land, but where the property is sold in consideration of a fee-farm rent or other rent-charge, it is usual for the contract to provide that the conveyance shall be prepared by the vendor, but at the expense of the purchaser, as it partakes of the nature of a lease.

By custom which has become law the vendor must enter into covenants for title. These are, however, not unqualified, but are restricted so as to indemnify the purchaser only against the acts of the vendor and of those through whom he claims otherwise than by purchase for value, and of those who may claim under him in the future. As the previous vendor for value will have entered into similar covenants, an unbroken chain of covenants for title is thus established in favour of the last purchaser, unless the vendor or his predecessor has purchased from trustees or mortgagees, for where the vendor is a trustee or mortgagee he only covenants against his own incumbrances. See COVENANTS IN LEASES; TITLE.

Mortgages.—The course of proceeding in this case is similar to the foregoing, the mortgagee being in the position of the purchaser, and his solicitor preparing the deed. It is not, however, usual to have any previous contract between the parties, so that in examining the title and preparing requisitions the mortgagee's solicitor is not limited by conditions and restrictions as in the case of a purchase, but he is only concerned to make sure that the title is good. Moreover, the mortgagor bears the expenses of the mortgagee as well as his own in the transaction. The mortgagor also enters into general covenants for title not limited to the acts of himself and his ancestors.

Lease.—A lease is not usually preceded by an agreement, unless for any reason the preparation of the formal lease must be unavoidably delayed. Where there is such previous agreement, it is better to set out in full the covenants intended to be inserted in the lease, rather than refer to them generally as the "usual covenants." In the absence of agreement the solicitor of the lessor prepares the lease, but at the expense of the lessee, who may be sued for the costs (*Grissell v. Robinson*, 1836, 3 Bing. N. C. 10); and the counterpart is prepared at the expense of the lessor. The lease is kept by the lessee, and the counterpart, which is only signed by the lessee, is kept by the lessor. This is done to avoid a second *ad valorem* stamp upon the counterpart. Where there is an agreement for a lease the parties are usually satisfied with that, and unless anything exceptional arises, no further document is prepared. The agreement must, however, bear the same stamp as the lease itself.

Transfers of mortgage and assignments of lease partake partly of the character of sales, partly of mortgages or leases (as the case may be), and the practice is adapted accordingly.

Marriage Settlements.—Where the future husband settles land, his solicitor, upon request, which, however, is often not made, furnishes an abstract of his title to the solicitor of the lady, who peruses it and makes requisitions as if acting for a purchaser. Upon the title being approved of, the husband's solicitor prepares the draft settlement, which he forwards to the other solicitor for approval. Where, however, there is a mutual settlement, property being also brought in by the lady or her father, the draft settlement is prepared by her solicitor, who, after approval, engrosses it. The costs are paid by the husband after the marriage.

Copyholds.—The practice with regard to the examination of title and the preparation of the surrender is similar to that in the case of freeholds. When the surrender has been executed, the solicitor of the surrenderee forwards it to the steward of the manor and attends at his office by appointment, or at the next Court, to take admittance, upon payment of the fine and fees. If the manor is at a distance, the steward will, for a special fee, appoint a deputy to take the surrender. The solicitor for the purchaser is usually appointed the deputy.

Personalty.—It sometimes happens that a title has to be shown to personalty by means of an abstract, as where a policy of assurance or stocks or shares are standing in the name of a person who is dead or has assigned them. The course of procedure is similar to that in the case of real estate. The titles are usually short.

Wills.—The preparation of wills and codicils does not follow so settled a practice as that of the deeds above mentioned, these documents being sometimes drawn by testators themselves. When drawn by solicitors, they are engrossed on strong paper, usually brief paper, the sheets bound together by tape, and secured by sealing-wax. The circumstances and desires of testators are so different that there is more room for the ingenuity of the draftsman than in the case of ordinary legal documents. When the property of the testator is "settled," the form and arrangement of the clauses are similar to those of marriage settlements. They are usually attested by the solicitor and his clerk. It is a good plan for every sheet of the will to be signed by the testator and the two witnesses at the bottom. The same persons should initial every alteration, interlineation, and erasure, as, in the absence of proof to the contrary, these will be presumed to have been made by the testator after execution, and be ignored. Wills do not contain recitals, except where they are operating as an exercise of a power of appointment.

Conveyancing is almost entirely carried out by means of deeds, that is, writings under seal. As regards the sealing of deeds and their execution, physical construction, and engrossment, see **DEEDS**. Since the Conveyancing Act, 1881, a receipt is not put on the back as well as in the body of the deed.

The presumption of law being that all alterations, etc., in deeds are made before execution, it is not considered necessary to initial them. Every legal document is indorsed with a short description of its nature and contents. Upon the top of the back is written the date, below this in the case of a conveyance come the names of the vendor and purchaser, and below this the nature of the deed; thus—"15th May 1897, Mr. John Smith to William Robinson, Esq.," and then, "Conveyance of a hundred acres of freehold land in the parish of —." If the document is only a copy or a draft, the words "copy" or "draft" are written above "conveyance."

The old engrossing hand formerly used is now quite given up, except sometimes for words to catch the eye, as "This Indenture," "Now this Indenture Witnesseth," and even in those cases but rarely. Documents, whether conveyances of land or otherwise, are written in plain, clear, ordinary writing; no stops are employed, although brackets are used for parenthetical statements; and no word is begun at the end of one line and finished at the beginning of the next.

A deed of conveyance, transfer, or assignment has always a certain customary form. It consists of (1) the date, (2) the parties, (3) the recitals, (4) the operative part, (5) the parcels, (6) the habendum, (7) the declaration of uses (if any), (8) the covenants for title (see DEED). The recitals describe the nature of the estates and interests of the conveying or transferring parties, and of the powers they are about to exercise, and sometimes of their objects in executing the deed. They explain the operative part, and act by way of estoppel upon the parties, and are now of importance as being *prima facie* evidence of the facts they state after a lapse of twenty years. The habendum, ushered in by the words "To hold," contains the limitation of the estate. In the case of marriage settlements it is followed by a great variety of clauses describing the uses and trusts upon which the property is to be held.

In drafting any but simple documents the practitioner writes only on one side of the paper, in lines wide apart (about an inch), and with a broad margin. He writes thus about two folios on a page, a folio being seventy-two words. If he writes more closely he is likely to find himself seriously embarrassed in making subsequent needful alterations and additions. He uses a set of recognised abbreviations: thus "hereditaments" is written "heredts." or "hereds."; "respectively," "resply."; and the everlasting word "said," "sd." Nearly every fourth word of an ordinary draft may be thus shortened. These abbreviations are sometimes used in documents passing between one solicitor and another, as in abstracts and fair copy drafts. One of the best known collections of conveyancing precedents is printed in this manner.

When lengthy and complicated documents have to be drawn, as conveyances with numerous recitals, or marriage settlements and wills, it may be useful to make a skeleton draft first, noting the various recitals or clauses proposed to be inserted in their order.

The provisions ordinarily occurring in legal documents have acquired a settled and recognised phraseology, which has been found most apt for the purpose, and which, by reason of its long employment, has been the subject of numerous judicial decisions, which have determined its exact scope and meaning. These are called "common forms," and are of great service to the conveyancer. He inserts them in his drafts with little or no alteration, knowing that he can rely on them for their particular purpose. He is also aided by books containing collections of precedents of entire documents of almost every kind and variety. By these means he has called to his notice all the provisions which are appropriate to the circumstances of the case he is dealing with, and is also supplied with suitable phraseology. Collections of this kind have long been in use, certainly since that compiled from the drafts of Sir O. Bridgeman, who flourished in the reign of Charles I. At the present day every practitioner is familiar with the precedents of Davidson, Key and Elphinstone, Bythewood and Jarman, Prideaux, and others. A book called Copinger's Index, which is an index to the precedents to be found in all the ordinary conveyancing collections, both ancient and modern, will also often be found very useful to the practitioner.

Although there are various methods of conveying real estate which may be still made use of, as a bargain and sale, a feoffment, a lease and release, yet in practice a deed of grant is invariably used for freehold estates. However, in the case of copyholds directed by a testator to be sold by his executors, the ancient common law bargain and sale (*q.v.*) is used. See COPYHOLDS.

Conveyancers use special terms in the operative part of deeds of transfer according to the nature of the transaction. Thus they "grant" freeholds; "assign" equitable estates or leases; "surrender" a lease to the owner of the reversion; "demise" for a term; "devise" real and "bequeath" personal property by will. The words "enfeoff," "bargain and sell," "alien," and "confirm" speak for themselves. The word "convey" for real property has come into use in modern times.

Conveyancing, unlike ordinary literature, does not describe what has occurred (except in the case of recitals), but is largely a compilation of rules for the regulation of future conduct. It consequently contains elaborate provisions designed to meet every possible contingency. The layman thinks only of those events that will probably arise. He assumes that his wife will survive him, their children will survive her. The conveyancer anticipates all events that can arise. His provisions are therefore often loaded with provisos, exceptions, and additions. He uses no words of ornament, and never omits for the sake of style any that he thinks necessary for removing possible ambiguity. Thus he repeats names time after time, where the use of the pronoun would leave any doubt as to the antecedent intended. Whenever a person or thing has once been mentioned, it is always afterwards referred to as the "said" so and so. Modern English is ordinarily employed, but certain old-fashioned words, such as "wherein," "thereto," "hereinafter", are found useful, and constantly used. And archaic forms are sometimes retained, as "this indenture witnesseth," "*doth* hereby grant." In recitals, only matters of fact should be stated; all conclusions of law should be omitted. Hence it does not seem proper to say "whereas by indenture of mortgage" or "*of lease*," but only "whereas by indenture." Recitals are usually made to follow exactly the document recited, the present tense being changed into the past tense. This sometimes leads to a curious result, as where a direction that trustees "do and shall," becomes "did and should." Sometimes, however, recitals summarise the effect of a document.

The length of documents dealing with property has become materially shortened of late years by the Conveyancing Acts, 1881 to 1892, the Settled Lands Acts, 1882 to 1890, and the Trustee Act, 1893.

The practice of conveyancing, except in the case of wills, is confined to members of the legal profession. Penalties are imposed upon anyone except barristers, solicitors, special pleaders, and certificated conveyancers in this country, and the officially recognised members of the legal profession in other parts of the United Kingdom, who should draw deeds for remuneration.

Charges.—The former method was to charge according to the length of the document; thus one shilling per folio was paid for perusing, two shillings for drawing, sixpence for engrossing documents. Charges are now in the case of sales, mortgages, and leases according to the amount of consideration money, unless otherwise stipulated. Thus the purchaser's solicitor is entitled to one and a half per cent. upon the amount up to £1000, with a diminishing percentage on higher sums. These charges are regulated by the Solicitors' Remuneration Act, 1881, and general orders made thereunder. See SOLICITOR, REMUNERATION OF.

[*Authorities.*—See Preston, *Conveyancing*; H. Greenwood, *Practice of Conveyancing*; Gover, *Advising on Title*; and the books of precedents above mentioned.]

Convict — Conviction. — These terms are in strictness correlative.

By conviction at common law was meant a verdict or plea of guilty followed by a judgment awarding punishment for the offence duly entered of record. Upon the construction of certain statutes it has been held that conviction is there used merely in the sense of a verdict or plea of guilty not set aside though not followed by a judgment, as where a person is merely bound over to come up for judgment (*R. v. Blaby*, [1894] 2 Q. B. 170); and in this sense it is to be understood in Acts increasing the punishment and prescribing the procedure as to offences committed after a previous conviction.

Though a convict would naturally be taken to mean a person against whom a conviction is made and recorded, the term is in practice applied only to persons imprisoned after conviction on indictment under sentence of imprisonment or penal servitude, and more particularly to persons sentenced to penal servitude, when relegated to the convict prisons of Borstal, Dartmoor, or Portland (see 13 & 14 Vict. c. 39; 16 & 17 Vict. cc. 99, 121), and not confined in the merely local prisons now vested in the Crown, which have taken the place of the old county and borough gaols and houses of correction. For the regulations as to the custody and discipline of convicts, see PENAL SERVITUDE; PRISON.

The provisions of the Forfeitures Act, 1870 (33 & 34 Vict. c. 23), with reference to the administration of the property of convicts, restrict the meaning of the term to persons upon whom sentence of death or of penal servitude has been passed upon a charge of treason or felony (s. 6), and who are by the Act placed under civil disability as to suing or alienating property or making contracts (s. 8).

The disqualifying effect of a conviction can, as a rule, be wiped out completely by a pardon, and for most purposes by suffering the sentence imposed (33 & 34 Vict. c. 23, ss. 2, 7), except the disqualification for holding a licence for the sale of intoxicating liquors. But see DISQUALIFICATION; PARDON.

Convocation. — The term Convocation is by English usage applied to each of the two Provincial Synods of Canterbury and York. There are two Convocations, one for each province, and the archbishop as metropolitan is *ex officio* president.

Each of these Convocations is divided into two Houses, an Upper and a Lower. The Upper House is composed of the metropolitan and com-provincial bishops. The *ex officio* members of the Lower House are the deans of the various cathedral and collegiate churches, and the archdeacons. The Provost of Eton also has an *ex officio* seat in the Lower House of Canterbury. Both Lower Houses contain a certain number of elected proctors, representative of the chapters and clergy. In practice, the representation of the clergy is at present confined to the beneficed clergy. In the Convocation of Canterbury, each chapter elects one proctor (including Westminster and Windsor), the clergy of each diocese two proctors. In the Convocation of York,

the metropolitan chapter elects two proctors, each other chapter one proctor; the clergy of each archdeaconry in England, two proctors; and the Manx clergy, one proctor. It is submitted, however, on the authority of *R. v. Archbishop of York*, 1888, 20 Q. B. D. 470, that the due manner (*modus debitus*) of representation of the clergy is a matter within the exclusive cognisance of the president, and outside the interference of the temporal Courts. *S.v. Randolph v. Milman*, 1868, L. R. 4 C. P. 107, as to the right of non-residentiary prebendaries to vote at elections of proctors for the chapter, notwithstanding the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113).

The Lower House of each province elect one of their number to be prolocutor, subject to confirmation by the president. The custom in the Southern Province is for the two Houses to sit separately. The custom in the Northern Province has latterly varied. It is believed to be within the power of the president in both provinces to command a sitting in a full Synod, subject to the right of the Lower House to deliberate and vote separately on any question. The assent of the Lower House is necessary to a synodical act. Bishops suffragan do not at present sit as such in the Upper House, though many of them sit as archdeacons or proctors in the Lower House. The clergy of the Channel Islands, though under the English See of Winchester, are not represented in the Convocation of Canterbury. On the other hand, both the chapter and the clergy of the Isle of Man are represented in the Convocation of York, and also have their own statutory Manx Convocation, which is really in the nature of a Diocesan Synod. The following tables show the customary composition of the two Convocations:—

CONVOCATION OF CANTERBURY.

UPPER HOUSE.

Archbishop of Canterbury, *President*; Bishops of London, Winchester, Bangor, Bath and Wells, Bristol, Chichester, Ely, Exeter, Gloucester, Hereford, Lichfield, Lincoln, Llandaff, Norwich, Oxford, Peterborough, Rochester, St. Alban's, St. Asaph, St. David's, Salisbury, Southwell, Truro, Worcester.

LOWER HOUSE.

Ex officio.—Deans of Canterbury, St. Paul's (London), Winchester, Bangor, Wells, Bristol, Chichester, Ely, Exeter, Gloucester, Hereford, Lichfield, Lincoln, Llandaff, Norwich, Christchurch (Oxford), Peterborough, Rochester, St. Asaph, St. David's, Salisbury, Worcester; Westminster, Windsor. Archdeacons of Canterbury, Maidstone; London, Middlesex; Winchester, Surrey, Isle of Wight; Bangor, Merioneth; Bath, Wells, Taunton; Bristol; Chichester, Lewes; Ely, Bedford, Huntingdon, Sudbury; Exeter, Totnes, Barnstaple; Gloucester, Cirencester; Hereford, Ludlow; Stafford, Stoke, Salop; Lincoln, Stow; Llandaff, Monmouth; Norwich, Norfolk, Suffolk; Oxford, Buckingham, Berks; Northampton, Oakham, Leicester; Rochester, Southwark, Kingston; St. Alban's, Colchester, Essex; St. Asaph, Montgomery, Wrexham; St. David's, Cardigan, Brecon, Caermarthen; Sarum, Wilts, Dorset; Nottingham, Derby; Cornwall, Bodmin; Worcester, Coventry, Birmingham; Westminster. Provost of Eton.

Elective.—One proctor each for the chapters of Canterbury, St. Paul's, Winchester, Bangor, Wells, Bristol, Chichester, Ely, Exeter, Gloucester, Hereford, Lichfield, Lincoln, Llandaff, Norwich, Christchurch, Peterborough, Rochester, St. Asaph, St. David's, Salisbury, Truro, Worcester; Westminster, Windsor. Two proctors for the clergy of each diocese.

CONVOCATION OF YORK.

UPPER HOUSE.

Archbishop of York, *President*; Bishops of Durham, Carlisle, Chester, Ripon, Manchester, Liverpool, Newcastle, Wakefield, Sodor and Man.

LOWER HOUSE.

Ex officio.—Deans of York, Durham, Carlisle, Chester, Ripon, Manchester. Archdeacons of York, Cleveland, East Riding, Sheffield; Durham, Auckland; Carlisle, Westmoreland, Furness; Chester, Macclesfield; Ripon, Richmond, Craven; Manchester, Lancaster, Blackburn; Liverpool, Warrington; Northumberland, Lindisfarne; Halifax, Huddersfield; Man.

Elective.—Two proctors for the chapter of York; one proctor each for the chapters of Durham, Carlisle, Chester, Ripon, Manchester, St. German's (Isle of Man). Two proctors for the clergy of each archdeaconry in England; one proctor for the clergy of the archdeaconry of Man.

The mode in which the Convocations are summoned is as follows:—

On the dissolution of Parliament, the two Convocations are usually dissolved. On the calling of a new Convocation the sovereign's writ directed to each archbishop commands him to "call together with all convenient speed in lawful manner, all and singular the bishops of your province, and deans of your cathedral churches, and also the archdeacons, chapters, and colleges of the same province, and the whole clergy (*totum clernm*) of every diocese to appear before you," etc. The accustomed place of meeting of the Convocation of Canterbury is "the Cathedral Church of St. Paul, London," and every new Convocation assembles there *pro forma*, being afterwards adjourned to Westminster. The Convocation of York meets at "the Cathedral Church of St. Peter, York." Since 1717, the two Convocations had been regularly elected, but had never assembled otherwise than formally, till, in 1852, the Convocation of Canterbury (*temp.* Archbishop Sumner), and in 1861, the Convocation of York (*temp.* Archbishop Longley), respectively met for despatch of business, and have since regularly done so.

See further, as to the legislative powers of the Convocation, ECCLESIASTICAL LAW; SUBMISSION OF THE CLERGY.

The Upper Houses of Convocation have also, in certain cases, judicial powers. By the Statute of Appeals (24 Hen. VIII. c. 12, s. 4), in any cause, matter, or contention which shall touch the king, his heirs or successors, the party grieved may appeal "to the spiritual prelates and other abbots and priors of the Upper House assembled and convocate by the king's writ," etc., *i.e.* to the Upper House of Convocation of the province. It was held in *Gorham v. Bishop of Exeter*, 1850, 15 Q. B. 52; 7 St. Tri. (N. S.) 1071, that even where the matter touched the Crown, an appeal lay from the Arches to the Judicial Committee. But this decision can hardly be regarded as conclusive. See S. C. in C. P. (10 C. B. 102) and in Ex. (5 Ex. Rep. 630).

The trial of a bishop for an ecclesiastical offence may also take place before the Upper House of Convocation of the province, as was recognised in *Read v. Bishop of Lincoln*, 1889, 14 P. D. 88, in which case it was held that the Archbishop of Canterbury sitting alone or with assessors had jurisdiction over his suffragans.

[*Authorities.*—Cardwell, *Documentary Annals and Synodalia*; Wilkins, *Concilia*; Lathbury, *Hist. of Convocation*; Joyce, *England's Sacred Synods and Acts of the Church*; Gibson, *Synodus Anglicana*; Trevor, *The Convocations*; Godolphin, *Rep. Can.* 98, 586; Phillimore, *Eccl. Law*, 2nd ed., ii. 1530–1564.]

Convoy.—To make sure that no CONTRABAND OF WAR (*q.v.*) is being carried by neutral merchant ships, belligerents are entitled to stop them on

the High Seas (*q.v.*), and to exercise over them what is called the right of VISIT AND SEARCH (*q.v.*). This right is regarded by most States as subject to the exception that when such merchant ships are accompanied by an armed warship they shall be exempt from being visited and searched. Voyages thus made are said to be made under convoy.

In 1801 and 1802 treaties were entered into between Great Britain, Russia, Sweden, and Denmark in which it was agreed not to admit the contention that a convoyed ship or fleet should be exempt from the right of visit and search. This arrangement, however, lasted only till 1812, and since then Great Britain has uniformly held that, in spite of a convoy, neutral merchant ships are liable to the belligerent right of visit and search.

Other European Powers and the United States incline to the opposite theory. In treaties of the latter with various South American States (*e.g.* with Venezuela, Jan. 20, 1836) the following provision touching convoys is inserted: "The declaration of the commander of the convoy that the vessels under his protection belong to the nation whose flag he carries, and, when they are bound to an enemy's port, that they have no contraband goods on board, will be sufficient."

See also Wharton's *International Law Digest*, 1886, s. 346.

The *Institut de Droit International* (*q.v.*) has laid down the rule as to convoys in the following terms:—

"When neutral ships of commerce are convoyed they shall not be visited if the commander of the convoy delivers to the belligerent ship, which stops him, a list of the ships convoyed, and a declaration signed by him stating that there is no contraband on board any of them, and giving the nationality and destination of the convoyed ships" (*Règlement International des Prises Maritimes*, s. 16, *Annuaire*, 1888, p. 221).

Mr. Hall, after a careful examination of the subject, concludes that the doctrine of immunity "is not embraced in the authoritative international law, and that while its adoption into it would probably be injurious to belligerents, it is not likely to be permanently to the advantage of neutrals" (*International Law*, 4th ed., p. 753).

[*Authorities.*—Hall, *International Law*, Oxford, 1895; Wharton, *International Law Digest*, Washington, 1886; Calvo, *Dictionnaire de Droit International*, Paris, 1885; Ferguson, *International Law*, 1884; Woolsey, *International Law*, 1879; Wheaton, *Elements of International Law*, edited by A. C. Boyd, London, 1880; Heffter, *Droit International Public*, traduit par Bergson, Paris, 1866; Manning, *Law of Nations*, bk. v. ch. xi.]

Copper Mine.—There is not much law applicable to copper mines as distinguished from other *metalliferous mines* (*q.v.*). Copper ore sometimes contains also proportions more or less rich of the precious metals, gold or silver, mines of which are royal mines, belonging to the Crown. By virtue of two old statutes, 1 Will. & Mary, c. 30, and 5 Will. & Mary, c. 6, the owner of any mine containing copper ore may work it, although gold or silver might be extracted from the same, without obtaining any licence or paying any royalty to the Crown. The Crown, however, has the option of purchasing such ore before removal at the price of £16 per ton.

Copper Works.—These works may be so conducted as to produce a nuisance, and if so may come within the purview of the law as to

NUISANCE (q.v.). The leading case of *St. Helens Smelting Co. v. Tipping*, 1865, 11 H. L. 642, was a case of nuisance caused by smelting copper, which was held to be actionable. Such works are now subject to special statutory regulations for minimising the injurious effects of the vapours produced in them. See **ALKALI WORKS**; **CHEMICAL PROCESS**.

Coppice or Copse (Couper) may be described as something between a wood and a plantation of trees; but it is usually a growth of trees or shrubs which is managed with the object, not of producing large timber, but smaller growths to be rendered marketable by periodical cuttings (*Fitzhardinge v. Pritchett*, 1867, L. R. 2 Q. B. 135). Whether of natural growth or artificial plantation, it is regarded as *fructus industrialis*, and the underwood, and in some districts also even timber trees, are cut for use or sale at regular intervals, in accordance with silvicultural experience or local custom, and the produce of the cutting may, as a rule, be appropriated by the tenant for life or years of the land on which it takes place (*Dashwood v. Magniac*, [1891] 3 Ch. 306, a case in which all the authorities are fully discussed). A copse is rateable under the Poor Law Acts as saleable under wood (43 Eliz. c. 2, s. 1; 37 & 38 Vict. c. 54, s. 4). Setting fire to a copse is felony by 24 & 25 Vict. c. 77, s. 16; wilful damage thereto is a petty misdemeanour under 24 & 25 Vict. c. 79, s. 22; and larceny or cutting with larcenous intent is punishable under 24 & 25 Vict. c. 96, s. 33.

Coprolites.—In *A.-G. v. Tomline*, 1877, 5 Ch. D. 750, coprolites were held to be minerals; they are likewise treated as such in the Factory and Workshop Act, 1878, Sched. IV. Part II., and in the Quarries Act, 1894, s. 1. In *Dant v. Moore*, 1863, 9 L. T. 381, for the purposes of tollage under the Canal Navigation Act, coprolites were held to fall within the clause imposing tolls on “other goods, wares, and merchandise,” and not within the clause relating to “stone, pebbles, sand, clay, manure, limestone.”

Copy of Depositions, Documents, Indictments.—See **DEPOSITIONS**, **EVIDENCE**, **INDICTMENT** respectively.

Copyhold.

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Definition.—Lands held by copy of Court roll are said to be of copyhold tenure; and, in the copy, such lands are expressed to be held according to the custom of the manor, and usually (although not invariably) at the will of the lord. All such lands are also *parcel* of the manor of which they are holden, and are not merely holden of the manor—being

in this particular (as in many others) different from the ancient freehold lands of the manor,—which latter are in no sense *parcel* of the manor, and, although holden of the manor, they are not holden by copy, but by freehold conveyance, with an acknowledgment of the tenure.

Origin.—The origin of copyholds is to be found in the villein tenure—villeins holding, or having held, patches or parcels of the lord's demesne lands at the lord's will,—that is to say, having had no legal title originally to their patches or parcels, as against their lord. But in process of time a custom became established conferring on the villein-holder or copyholder a certain fixity of right to hold, or a certain right to continue holding, his patch or parcel of the lord's demesne lands; and under this custom the copyholder became entitled to hold *according to the custom of the manor*, the will of the lord being subordinated to such custom.

Varieties and Sub-Varieties.—The custom of the manor above referred to operated, of course, within the manor only; and the custom of one manor might (and usually did) differ from the customs prevailing respectively in other manors. And, accordingly, the quasi-estate in his holding which the copyholder acquired under the custom of the manor, was in some manors a customary fee-simple estate, while in others it was an estate for lives or for years; and copyholds fall therefore into two great divisions, that is to say, copyholds of inheritance and copyholds for lives or for years. The copyhold of inheritance was by far the most prevalent variety of the copyhold tenure—the copyhold for lives or for years obtaining for the most part in ecclesiastical manors only, and being (if the custom was so) renewable *as of right* and from time to time for a further number of lives or further term of years, upon such terms as the custom in that behalf appointed or prescribed (*Duke of Grafton v. Horton*, 1726, 2 Bro. P. C. 284; *Walker v. Lord Abingdon*, 1841, 10 L. J. N. S. Ch. 289). Copyholds for lives or for years presented therefore two sub-varieties, being either copyholds with the right of renewal, or copyholds without any right of renewal.

Limitation of Estates.—The copyhold of inheritance might (by the copyholder) be limited or settled exactly, or almost exactly, as the fee-simple estate in lands of freehold tenure might be limited or settled, that is to say, on A. for life, with remainder to B. for life, or (as the case might be) in fee-simple—each successive limitation being to hold (and being held) according to the custom of the manor; and in some cases also the limitation might be of an estate in tail,—*scil.* where the statute *de donis conditionalibus* (13 Edw. I. c. 1) had been adopted within the manor (*Roe & Crowe v. Baldwere*, 1793, 5 T. R. 104; 2 R. R. 550; *Moore v. Moore*, 1755, 2 Ves. 601); and equitable limitations might be created, as well as legal limitations. Also, and to the same extent that limited estates and interests in lands of freehold tenure, *e.g.* life estates and estates for years, might be settled or sub-limited, so copyholds for lives or for years might be settled or sub-limited upon a succession of limitations or sub-limitations—subject (in the case of each) to the sub-limitations determining on the determination of the limited estate or interest out of which they were created or sub-limited—or (where the case was so) making a fresh start and acquiring a further continuance, on the renewal of the copyhold grant for a further number of lives, or for a further term of years—which renewal, as above is stated, was of right when there was a custom of the manor to renew; and the renewal might (even when there was no such custom) have been in all cases effected upon terms to be from time to time and at the time of each renewal agreed upon between the tenant and the lord. All such limitations, or sub-limitations, by way of settlement of the copyhold estate are, of course, to be distinguished from the copyhold estate

itself for lives or years, as originally subsisting or created, and arising according to the custom of the manor.

Antiquity of—also, Modern Creation of—Copyholds.—The quasi-estate of the copyholder depending on the custom of the manor, and a custom being necessarily of immemorial antiquity, it follows that, as a general rule, the copyhold tenure cannot be created at the present day. But to that general rule there have always been two exceptions—and one of such exceptions still exists, that is to say:—Firstly, where there is (or was) a custom for the lord to grant parcels of the waste lands of the manor to hold by copy—all which grants required for their validity the consent of the homage of the manor—there the parcels granted became of copyhold tenure; but, as regards all such grants, the consent of the Board of Agriculture thereto is also now required to the validity thereof; and in every case the grant, being validly made, operates now to pass a freehold interest to the grantee, exactly as if the copyhold tenure resulting upon the grant were by an instantaneous enfranchisement converted into freehold tenure (Copyhold Act, 1894, 57 & 58 Vict. c. 46, s. 81). And, secondly, where there is a general inclosure of the waste lands of a manor, under the provisions of a local inclosure Act, if the inclosure Act expressly enacts—as it in general does—that the allotment to be made under its provisions shall be of the like tenure as the ancient tenement in lieu of which, or in respect of which, it is allotted, then, and in every such case, the parcels of waste which are allotted in lieu of, or in respect of, ancient copyhold tenements become of copyhold tenure, although (prior to the allotment) they were of freehold tenure; and there is a general provision to that effect contained in the General Inclosure Act, 1845, 8 & 9 Vict. c. 118, s. 94, and which general provision is still in full force, although, by the Amendment Act of 1848, 10 & 11 Vict. c. 111, s. 6, it is provided that, subject to the sanction of the Board of Agriculture, any such copyhold allotment may, with the consent of the lord and upon the request of the allottee, be instantaneously enfranchised. And, of course, also by the specific provisions of any particular statute, *e.g.* by the provisions of any statute authorising the alienation of specific Crown lands, it may be, but hardly ever is, directed that the parcels alienated (or some of them) shall be holden of the Crown as lord, and shall be and remain part or parcel of the Crown's demesnes, and shall be alienable by the Crown grantee by surrender and admittance, and shall in all other respects be enjoyed by the Crown grantee, according to the customs of the Crown manor of Greenwich, or other specified manor.

Alienation.—Copyholds of inheritance are descendible—on the death of the copyholder intestate; and copyholds for lives or for years will also, upon such event, descend,—or, speaking more properly, devolve,—upon the legal representative of the copyholder—at least, in the general case. And the descent or (as the case may be) the devolution is regulated by the customs of the manor in that behalf applicable; and so far as such customs are inapplicable, the descent or devolution will be according to the rules of the common law as modified by statute. Copyholds of every variety are also now devisable, the Statute of Wills (1 Vict. c. 26) having abrogated every custom of the manor to the contrary. Also, copyholds are now, in all instances, alienable *inter vivos*,—provided the mode of alienation *inter vivos*, which is appointed by the custom, is pursued, and in some cases, *e.g.* where any statute appoints a different or alternative mode of alienation, even without pursuing the customary mode of alienation.

1. *Descent.*—And, firstly, as regards the descent or devolution of copyholds upon an intestacy.—Copyholds of inheritance descend upon the

customary heir, that is to say, upon the heir who is designated by the custom of each particular manor; and where the custom is silent (and so far as it is silent) regarding the heir, then these copyholds descend upon the heir-at-law, that is to say, upon the heir according to the course of the common law, as amended by the Descent Acts (3 & 4 Will. iv. c. 106; 22 & 23 Vict. c. 35, s. 19). And the customs regulative of the descent in one manor differ in general from the customs which regulate the descent in other manors—there being an almost infinite variety in the customs of descent in different manors. The steward will, in the general case, certify the custom as to descents, and indicate who is the customary heir; but his certificate is not in all cases sufficient—requiring to be applied with knowledge and discrimination; and it is in no case conclusive. Copyholds for lives or for years devolve upon the person nominated by and in the customary grant, but, in the general case, devolve not upon the customary heir (because they are not, in fact, inheritable, and no custom as to the descent thereof exists therefore), but devolve upon the legal personal representative like personal estate. Also, both as regards copyholds of inheritance (*Bush v. Locke*, 1834, 3 Cl. & Fin. 721) and copyholds for lives or for years (*Hinton v. Hinton*, 1755, Amb. 277), the descent or devolution is, in the case of intestacy, subject in general to the widow's life interest or other her widowhood interest therein, which interest (in the case of copyholds of inheritance) is called her freebench; or where the deceased intestate was a female, the descent of her copyholds of inheritance will be subject (in the general case) to the estate of her husband by the curtesy, or to other the husband's estate therein; and the devolution of copyholds for lives or for years may be subject to an analogous estate in the husband (*Brown's case*, 1581, 4 Rep. 21 a; *Doc & Milner v. Brightwen*, 1809, 10 East, 583; 10 R. R. 395).

As examples of the various customs of descent, the following may be instanced, namely:—The custom of Tynemouth, whereby all the sons succeed together as coparceners; the custom of Islington, whereby, as in freehold lands of Borough English tenure, the youngest son alone is heir; the custom of Stepney and Hackney, whereby, as in freehold lands of Gavelkind tenure, all the males in equal proximity (or who, by representation, are deemed to be in equal proximity) and not merely all the sons, succeed together as coparceners; and the manors of Acton, Faling, and Isleworth, whereby the youngest male of all the males in equal proximity, and not merely the youngest son, is heir.

Also, the customary descent is sometimes made to depend on the circumstance of the intestate "*dying seised*," not being applicable where he was not, in the proper sense of the word, *seised* at the time of his death; and sometimes, as where the intestate leaves copyhold lands of different tenures, although within the same manor, the customary descent is made to depend on the order of time in which the intestate was admitted to the respective copyholds, the youngest son or the eldest son being the heir to both, according as the order of the admittances has been the one way or the other; so that, in fact, the custom of descent in each particular manor, and as regards the particular lands, is to be ascertained, and (being once ascertained) is in each particular case to be applied with consummate carefulness and accuracy.

2. *Devise*.—Secondly, as regards the devise of copyholds.—Copyholds are now devisable exactly as freeholds are devisable—and with the same formalities, neither more nor less (1 Vict. c. 26). But anciently, and in fact until the year 1815—when the Act commonly called Preston's Act (55

Geo. III. c. 192) was passed, and which in this particular was the precursor of the Wills Act, 1837—the only mode of devising copyholds was by first surrendering them (*i.e.* conveying them *inter vivos*) to the lord of the manor to such uses as should by the surrenderor be declared of and concerning them in and by his last will; and the will was a mere declaration of the uses and trusts to or upon which the surrender was to operate; and such a will required no attestation whatsoever. Therefore, prior to the Wills Act, 1837 (1 Vict. c. 26), it was necessary that the testator should in all cases have been first admitted to the lands which he desired to surrender to the uses of this will—for, as will presently be seen, no one but the admitted tenant on the Court rolls was competent to surrender his copyhold; but this rule was, of course, applicable to the legal estate only, and not also to the equitable estate in the copyholds—when the legal and the equitable estates were in different persons. And here it is to be observed, that a devise of real estate generally would (and will) include the copyhold as well as the freehold hereditaments of the testator (*Chapman v. Hart*, 1749, 1 Ves. 273; *Kidney v. Coussmaker*, 1806, 12 Ves. 136; 2 R. R. 118); but a devise of the testator's freehold estates would, of course, not extend to include his copyhold estates (*Quennell v. Turner*, 1851, 13 Beav. 240; *Bright-Smith v. Bright-Smith*, 1886, 31 Ch. D. 314).

And as regards copyholds for lives (or for years) which were (or are) renewable—that is to say, renewable *as of right*—the copyholder (*scil.* the first life) might devise the same, notwithstanding that the custom of the manor should be that the copyholds should pass to the next life or lives, the custom in question (when it exists) having reference only to the legal estate and not to the beneficial interest (*Smith v. Baker*, 1737, 1 Atk. 385; *Allen v. Bewsey*, 1877, 7 Ch. D. 453); for the second and third lives take only as trustees for the first life and his devisees—unless, of course, the second and third lives, as being children of the first life or for any other reason, are themselves entitled beneficially after the first life (*Jeans v. Cook*, 1857, 27 L. J. Ch. 202).

And as regards the devise of copyholds of inheritance generally, the law is now well settled that the legal estate vests in the customary heir, notwithstanding that there is an effective legal devise; and it is divested out of him and vested in the devisee, only if and when the devisee accepts the devise, by, *e.g.*, claiming to be admitted to the lands as devisee (*Glass v. Richardson*, 1852, 9 Hare, 700; *Garland v. Mead*, 1871, L. R. 6 Q. B. 441).

When the will contains no devise of the copyholds, but merely a direction to the trustees or executors of the will to sell the copyholds, in such a case also the copyholds vest in the customary heir until there is a sale pursuant to the direction to sell, and thereupon they vest in the purchaser on his claiming to be admitted thereto, equally as if he were himself the beneficial devisee thereof named in the will (*R. v. Wilson*, 1862, 3 B. & S. 201; *Townsend's Contract*, [1895] 1 Ch. 716).

In all other respects, copyholds are like freeholds, as regards all the incidents of the devise thereof, and as regards also the true construction or effect of the devise and conveyance.

3. *Surrender and Admittance.*—Thirdly, as regards the alienation of copyholds *inter vivos*.—This alienation is effected, in the general case, by surrender and admittance—the alienor (who for this purpose must be the admitted tenant on the Court rolls) (*Doe & Tofield v. Tofield*, 1809, 11 East, 246; 10 R. R. 496) surrendering the copyholds to the lord to the use of the alienee, and the alienee coming in under the surrender and being admitted by the lord to the copyhold hereditaments comprised in the surrender. And the rule is,

that the parcels shall be accurately described in the surrender; and also that the estate or interest intended to be passed into the alienee should be expressly limited in and by the surrender—for in both these particulars the surrender will control the subsequent admittance when taken thereunder (Co. Cop. s. 41; Scriv., 7th ed., pp. 86, 100–102). And although the surrenderee should delay taking admittance, whereby the surrenderor remains the legal tenant on the Court rolls (*Doe v. Tofield*, 1809, 11 East, 250; 10 R. R. 496), yet the surrenderor is, after the surrender, but a trustee for the surrenderee; and on the surrenderee taking admittance subsequently, his admittance relates back to the date of the surrender, and that for all purposes (*Benson v. Scott*, 1693, Carth. 276; *Doe v. Hall*, 1812, 16 East, 208); but if the surrender should have been voluntary (that is to say, if the alienation was to a donee, and by way of gift only and without valuable consideration), the surrenderor might afterwards surrender for value to some third person, and so defeat his former surrender—at least, prior to the Voluntary Conveyances Act, 1893, 56 & 57 Vict. c. 21, the surrenderor might have done so.

Where the alienation is intended as a security only—that is to say, when it is by way of mortgage only—it is effected by a conditional surrender—that is to say, a surrender which is to become and be valid for all purposes only in the event of the surrenderor's default in payment of the mortgage debt. And under such a surrender, the surrenderee should not proceed to take admittance until such default—nor in fact, in the general case, after such default, unless and until he has sold, or is about to sell, or is transferring. And after a conditional surrender, where it has not (and until it has been) followed up by an admittance, the surrenderor remains the legal tenant on the Court rolls, and the surrender being in due course afterwards vacated by payment of the mortgage debt, the surrenderor needs not, in such a case, to be admitted again; *secus*, if the surrenderee by way of mortgage has meanwhile been admitted under the conditional surrender (*Pawcet v. Lowther*, 1751, 2 Ves. 300; Gilb. Ten. 276).

Where the alienor is one of several co-tenants, he can surrender his undivided share; and where the co-tenancy is a joint-tenancy, any such surrender will operate as a severance of the joint-tenancy, and so will defeat the right of survivorship (*Constable's case*, Co. Lit. 59 b; *Porter v. Porter*, 1606, Cro. (2) 100; *Allen v. Nash*, 1608, 1 Brownl. 127).

Although, as above indicated, the surrenderee may (and in some cases ought to) delay taking admittance under his surrender, still he cannot, in the general case, delay his admittance indefinitely; for if, pending the surrenderee's delay, the surrenderor should die, the Court roll becomes thereupon vacant, and the lord may forthwith (on due proclamation of the vacancy) seize the copyholds into his own possession until someone entitled to take comes forward to take admittance—this right of the lord being called his right of seizure *quousque* to compel admittance. But until the roll is so vacant as aforesaid, the lord cannot, without showing a special custom of the manor enabling him to do so, compel the admittance of any surrenderee (*Basspöol v. Long*, 1600, Yelv. 1; Cro. (1) 879). Also, a surrenderee who is desirous of selling (or even of mortgaging) his copyholds, is bound to be admitted in order to effect the sale or mortgage; because until he is admitted he cannot surrender to the purchaser or mortgagee; and this is so, although he may be in the actual possession and enjoyment of the copyholds, and otherwise be exclusively entitled thereto (*Doe & Tofield v. Tofield*, 1809, 11 East, 246; 10 R. R. 496). Also, a surrenderee who is desirous of enfranchising his copyhold tenement—in manner hereinafter indicated—must first of all

procure himself to be admitted to his tenement; for the lord is not compellable to regard anyone as tenant who has not been admitted or who is not entered on the Court rolls as the tenant (Copyhold Act, 1894, s. 1; *Wilson v. Allen*, 1820, 1 Jac. & W. 611; 21 R. R. 255).

When, however, the copyhold has been limited to A. for life, with remainder to B. in customary fee-simple, the admittance of A. (although but for his life) will operate and enure as the admittance of B. also—at least, in general (*Doe v. Jenney*, 1804, 5 East, 522; 7 East, 22). Also, in the case of co-tenants who are joint-tenants, the admittance of one of such tenants is the admittance of all of them; and on the death of one of them, before any severance of the jointure, his share will survive to the others, and they need not be admitted *de novo* in respect of such share (*Mortimer's case*, 1630, Het. 150; *Reid v. Shergold*, 1805, 10 Ves. 370); and similarly, if one of the joint-tenants releases his undivided share to the others (*Wase v. Pretty*, 1622, Win. 3); but co-tenants who are tenants in common and not joint-tenants are differently situated in all these respects (*Fisher v. Wigg*, 1701, 1 Salk. 391; *Attree v. Scutt*, 1805, 6 East, 484).

A surrenderee (or other legal alienee) of copyholds will occasionally be admitted by implication, e.g. by his payment of the quit rents to the lord and by the lord's acceptance of such quit rents from him as the copyholder; and such admittance supersedes the necessity of an express admittance, whether for the purpose of vesting the legal estate in the surrenderee or even, *semble*, for the purpose of shutting out the lord's right of seizure *quousque*—the lord's omission in such a case to enter the implied admittance on the Court rolls being the lord's own default, *semble*.

Also, a surrenderee of copyholds may, in general, compel the lord to admit him—obtaining for this purpose a mandamus from the Queen's Bench Division, or else an order in the nature of a mandamus from the Chancery Division, directed to the lord and his steward (*R. v. Coggan*, 1805, 6 East, 431; 8 R. R. 509); but the lord may not, in general, compel such admittance, save where (as has been already stated) the Court roll is without a tenant, and then only by exercising his right of seizure *quousque*.

4. *Statutory Substitutes for Surrender and Admittance.*—The alienation of copyholds by surrender and admittance, although it is the recognised customary assurance thereof, is not in every case essential; that is to say, the alienation may, in certain cases, be effected otherwise than by surrender and admittance. Thus, a copyholder whose lands have been taken under the provisions of the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18, may convey them to the company by a common law deed, usually a deed poll; and the title acquired by the company under such a deed is the effective legal title, equally as if a surrender had been the mode of alienation adopted—but with this difference, namely, that the company need not (and should not) as surrenderee proceed to obtain admittance, but may proceed to enfranchise without being first admitted. Again, when copyholds are settled on A. for life with remainders over, and A. sells the copyholds for the customary fee-simple estate therein, under the power in that behalf given to him by the Settled Land Act, 1882, he may, by the common law deed in that behalf appointed by sec. 20 of the Act, effectively and legally pass the copyholds to the purchaser for the whole legal fee-simple estate therein; and the grantee under such a deed is entitled to be admitted—and may even compel the lord to admit him—thereunder (45 & 46 Vict. c. 38). Also, under the provisions of the Bankruptcy Act, 1883, the trustee in the bankruptcy may, and without being himself first admitted thereto, alienate the copyholds of the bankrupt by a common law deed; and the

alienee may compel the lord to admit him under the deed. And under the provisions for the *exchange* of lands, which are inserted in the Inclosure Acts, 1845–1868, the parties may, in general, effect an exchange of their copyhold tenements by a deed or deeds in the prescribed form—and sometimes even by an order of exchange without any deed; and similarly, partitions may be effected of copyhold lands by an order of partition—and neither under the order of exchange nor under the order of partition is any subsequent admittance required; but the deed or order must be entered on the Court rolls. Also, under the provisions of the Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 34, where the copyhold lands are held upon trust (either express or implied), an alienation thereof to new trustees, or (as the case may be) to a purchaser, may be effected by a vesting order of the Chancery Division of the High Court (or, in certain cases, of the County Court), which order may be made either with or without the consent of the lord of the manor; but, *semble*, the alienee must in due course procure himself, in either case, to be admitted on the Court rolls under the order, so as to entitle the lord to his fine and the steward to his fees by and in respect of the admittance.

Fines and Fees on Alienations, Descents, etc.—And as regards the lord's fines and the steward's fees—both the fines and the fees are determined by the customs of the manor.

(1) *Fines*.—In the general case, the fines are payable on the death of or on any alienation by the copyholder—but not (save in the most exceptional cases) on the death of, and in no case upon any alienation by, the lord. Also, the rule is, that a fine is payable on admittance only—and therefore in no case when no admittance is required. And the fines payable are either arbitrary or certain, according as the custom has appointed; but even where arbitrary, the fines must be reasonable. A fine arbitrary is measured by and with reference to the annual value of the copyhold tenement; and in the case of copyholds of inheritance, two years' improved annual value in the case of a descent or devolution on death, and one and a half year's improved annual value in the case of an alienation *inter vivos*, is in general the reasonable maximum; but in exceptional cases, one year's improved annual value would be the reasonable maximum. In the case of copyholds for lives (or for years) that are renewable *as of right*, the fine is certain beforehand, and is not calculated as in the case of copyholds of inheritance; and, of course, where the renewal is not as of right, the amount of the fine payable for the renewal is merely a matter of bargain between the lord and the tenant. A fine certain is, when, *e.g.*, $\frac{6}{8}$ for each house or for each acre of land is appointed by the custom. And in the case of arbitrary fines, there are many distinctions taken by the particular customs of particular manors. For example, in some manors, the fine on a *descent* is nominal only, while on a purchase and even upon a devise, it is of the full maximum amount, and sometimes of even more than the full maximum amount; and in other manors, persons who are already copyhold tenants of the manor, pay merely nominal (or very small) fines on their admittances to other copyhold tenements acquired by them; and in these lastly mentioned manors, a man is permitted to purchase first a small tenement, taking admittance thereto and paying his full arbitrary fine in respect thereof, in order to escape payment of any further fine (save a nominal fine) on his subsequent purchase of a larger tenement or tenements. Also, in the case of copyholds which have been limited to A. for life, with remainder over to B. in customary fee-simple, the fine payable when arbitrary is apportionable

between A. and B.—unless when by the custom of the manor the lord is entitled (which he seldom or never is) to exact a full fine from the remainderman as well as the full fine from the tenant for life. Also, where admittances have been delayed or neglected, a double, and (sometimes) even a treble fine will be payable; for the rule is, that a fine is payable in respect of each devolution of the tenement; and therefore, firstly, only one fine will be payable when there is but one devolution; but, secondly, two fines will be payable when there have been two devolutions, and, in fact, as many fines as there have been devolutions,—being devolutions through or under the last admitted tenant. But when the apparent devolution is not, in fact, a devolution, but is a mere *substitution* for some intermediate devolution; also, where the apparent devolution is not *through* or *under*, but is quite apart from, the intermediate devolution, as where it is (*e.g.* under the Settled Land Act, 1882, s. 20) a statutory supersession of such intermediate devolution, no fine will, in either of such cases, be payable in respect of such intermediate devolution, and the only fine payable will be in respect of the devolution which is in substitution for, or (as the case may be) in supersession of, the intermediate devolution,—all which matters are fully treated of in Scriven on *Copyholds*, 7th ed., by FLOWN, on pp. 184–188. Therefore also, when a testator has directed his executors to sell his copyholds, and they have sold them, the purchaser becomes like the direct devisee thereof under the testator's will, and the legal estate which was in the testator (and which has been for the moment vested in the customary heir) vests in the purchaser as if by one devolution out of the testator—and the purchaser pays in such a case only one fine on his admittance; and similarly, in all cases of executory devises and of estates arising under the exercise of powers of appointment and of statutory powers (*Randfield v. Randfield*, 1860, 1 Drew. & Sm. 310; *Nayler & Spendlow's Contract*, 1886, 34 Ch. D. 217). On the other hand, as regards joint-tenants—the admission of any one of whom is the admission also of the others—there are as many fines payable as there are joint-tenants admitted by the admittance of the one; and the usual practice in such cases has been, to take for the first tenant a full fine of two years' value, and for the second tenant a fine of half that amount, and for the third tenant a fine of one-half of that one-half, and so on throughout the number of tenants—a practice which has now become, in fact, a well-established principle of copyhold law (*Lord Wellesley v. Withers*, 1855, 4 El. & Bl. 750; *Bence v. Gilpin*, 1868, L. R. 3 Ex. 76).

And as regards the assessment of the fine payable—whether it be a single fine, a double fine, or a treble fine—the rule is, that the steward shall assess it, but at his own (and the lord's) peril in case of excess; and the assessment should be made in respect of each copyhold tenement separately from the other tenements comprised in the devolution; all which having been done, and the amount or aggregate amount of the assessment having been demanded, the lord may thereupon proceed to recover the fine by action of debt, within six years from the date of the assessment and demand, but not afterwards (*Fraser v. Mason*, 1883, 10 Q. B. D. 398; 11 Q. B. D. 524).

(2) *Fees*.—The steward's fees being fees properly so called, and not being mere charges by the steward for work done, are payable in respect of every act of Court; and by act of Court is intended, *e.g.*, the taking of a surrender and the entry thereof (with or without the subsequent admittance) on the Court rolls of the manor; and the rule is, that the steward may (by special custom) charge a separate fee in respect of each separate copyhold tenement, even where several of such tenements are inserted or comprised in one admission; but in general, that is to say in the absence

of such special custom, he can in such a case charge one full fee only for the first of the distinct or separate tenements comprised in the admission, getting, however, a further payment on account of or in respect of each tenement beyond the first that is comprised in the admission, or (as it is said) for each *ac etiam* in the admittance, and such further payment is in the nature of a payment upon a *quantum meruit*, and sometimes the whole fee will be ascertained on a *quantum meruit* (*Traherne v. Gardiner*, 1856, 5 El. & Bl. 913). And here it is to be observed that for the purposes of the steward's fees (as indeed for other purposes generally) each undivided share in a copyhold tenement is itself a distinct and separate tenement (*Attree v. Scutt*, 1805, 6 East, 476).

When the alienation of the copyhold tenement has by the express provisions of the statute law been disencumbered of certain of its customary formalities (being formalities in respect of which the steward was theretofore entitled to a fee)—and also, where, by the like statutory provisions, a mode of conveyance of the copyhold tenement other than the customary one has been appointed or substituted—it is, in general, provided that the simplifications and other provisions of the Acts shall not affect or prejudice the steward's fees—and of these Acts, the Wills Act, 1837, 1 Vict. c. 26, the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18, and the Settled Land Act, 1882, 45 & 46 Vict. c. 38, are the chief examples; and by all of these Acts, the steward's fees are maintained intact, although, of course, they are not increased thereby (*Naylor & Spennell's Contract*, *supra*). And after an enfranchisement of copyholds under the Copyhold Acts, 1841–1857, special provision was made by these Acts for the steward's fees, and for compensating him for the loss of fees which the enfranchisement would occasion; and these provisions are continued by the Copyhold Act, 1894, 57 & 58 Vict. c. 46, as regards enfranchisements under that Act.

Customary Freeholds.—What has been above written has had reference to copyhold lands properly so called; but besides these lands there are other lands of customary tenure, which have been not unfrequently called customary freeholds. Now these so-called customary freeholds are, in reality, merely copyholds, with hardly a single feature of difference (*Doe d. Reay v. Huntington*, 1803, 4 East, 271); that is to say—just as the timber trees growing upon and the mines and minerals (including the clay, sand, and gravel) within or under copyholds, properly so called, belong in general to the lord, the tenant having in general only certain limited rights (called *estovers*) therein or thereto—so the timber trees upon and the mines and minerals within or under these so-called customary freeholds belong in general to the lord, the tenant having in general but a right of *estovers* therein or thereto; but in either case the custom may enlarge the tenant's right, and even divest the lord altogether of his right in the timber trees and mines. And again, customary freehold lands are held by copy, equally with copyhold lands properly so called, and the mode of alienation which is prescribed by the custom for copyhold lands is the mode of alienation which is prescribed also for the customary freehold lands; and the customary freeholds are in all respects held according to the custom of the manor, equally as the copyhold lands are holden; and they are also parcel of the manor, and not merely holden of the manor. And in all the particulars aforesaid these customary freeholds (equally like copyholds proper) are wholly distinguishable and distinguished from the ancient freehold lands within and holden of the manor, which were referred to in the definition of copyholds given above.

There is, it is true, one particular in which these so-called customary freehold lands resemble the ancient freeholds of the manor; but in that

particular, copyholds properly so called also resemble these ancient freeholds, that is to say, the particular incident of *escheat, per defectum sanguinis*, that is to say, lands whether of ancient freehold or of customary freehold tenure, and also lands of copyhold tenure, properly so called, in case the tenant thereof dies intestate and leaves no heirs, escheat to the lord for want of such heir. And there are other particulars in which the two tenures of ancient freehold and of customary freehold, more or less, agree; but in every one of these particulars, the copyhold tenure proper also agrees with the ancient freehold tenure as with the customary freehold tenure, as, *e.g.*, in the right of common which is appendant or appurtenant to lands of each of these three tenures in or over the waste lands of the manor.

There are also to be found in certain manors—being manors which in Domesday Book are mentioned to have belonged to Edward the Confessor, and then to belong to William the Conqueror—copyhold and customaryhold lands called *ancient demesne* lands. See ANCIENT DEMESNE.

Incidents of Copyhold Tenure.—The incidents of tenure annexed to lands of copyhold tenure, besides the incident of escheat already mentioned, are principally the following, that is to say: (1) fealty; (2) suit of Court; (3) quit rents; (4) reliefs; and (5) heriots; for the nature of each of which incidents of tenure, reference is made to the title itself.

Disadvantages of the Copyhold Tenure.—Besides these incidents of tenure properly so called there are also certain disadvantages annexed to lands of copyhold tenure; that is to say, besides their liability to fines already dealt with, and besides the necessity for observing in the alienation thereof the mode of alienation appointed by the custom, with the fees payable to the steward on every such alienation, there are the following further disadvantages, namely:—

The copyholder, although entitled for the customary fee-simple, is restricted in his powers of leasing his lands, being able to lease for one year only, or (if the custom so prescribe) for three years or so; and he is restricted also in his power of using the land, being, *e.g.*, unable to commit waste upon his tenement, save at the risk of forfeiting his tenement; and for the doing of waste, or for the making of a lease beyond the term appointed by the custom, he is required at considerable expense to procure from the lord, through his steward, a licence to commit the waste, or to make the lease; and the licence is only to be obtained upon terms profitable to the lord. And that is so, although the waste intended to be committed is ameliorative waste, and although the longer duration of the lease will enhance the rent, so that the arbitrary fines to become and be payable to the lord on the next devolution of the tenement will be correspondingly and considerably increased, being (as they will be) assessed upon the then improved annual value. And these disadvantages are commonly considered of a more vexatious character than the mere liability of the land to the incidents of the copyhold tenure, which are above enumerated.

Enfranchisements and Commutations.—And accordingly it has been the wish of copyholders to sometimes commute these burdensome incidents, or to more often enfranchise the tenement and so get rid of them altogether; and the Legislature has also, from time to time, provided facilities for their commutation, and also for the enfranchisement of the copyhold lands. And, in conclusion of this article, it is proposed to consider the subject of enfranchisements and incidentally of commutations.

1. *Enfranchisements.*—Now an enfranchisement may be effected by agreement of the lord and tenant, and either apart from the Copyhold Acts altogether, that is to say, purely under the common law, or under and

pursuant to the provisions in that behalf contained in the Copyhold Acts; and commutations also may in like manner be effected by such agreement as aforesaid between the lord and the tenant. Also, compulsory enfranchisements may be effected—that is to say, enfranchisements at the instance of either the lord or the tenant may be compelled—but only under the Copyhold Acts, and according to the compulsory provisions in the Acts contained; but all commutations were (and are) voluntary only, and not compulsory.

(A) *Enfranchisements at the Common Law*.—And firstly, as regards an enfranchisement apart from the Copyhold Acts, *i.e.* at common law. A lord entitled in fee-simple, or for a limited estate but with an express power of sale or of enfranchisement, may agree with the copyholder for an enfranchisement of the copyhold tenement; and the copyholder, although entitled for his life only, or for any other limited estate only, may accept such an enfranchisement, the enfranchisement in such case enuring for the benefit of all the remaindermen as well (*Wynne v. Cutler*, 1 Bro. C. C. 515). But upon such an enfranchisement the tenant for life pays the whole cost thereof, that is to say, both the compensation to the lord (commonly called the enfranchisement consideration), and also the costs and expenses or the legal charges of the enfranchisement, without, in the general case, any right to contribution from the remainderman. And besides that disadvantage, every common law enfranchisement is affected by all (if any) the mortgages and charges which affect the manor itself; and the lord's title requires therefore in every such case to be investigated and approved. Also, a common law enfranchisement will defeat and destroy the rights of common over the waste lands of the manor, which were theretofore appurtenant to the copyhold estate; and such rights of common must therefore, in every case of a common law enfranchisement, be regranted or recreated, and made appurtenant again to the enfranchised tenement, in and by the deed of enfranchisement by which the enfranchisement is effected (*Bradshaw v. Eyre*, 1597, Cro. (1) 570). Also, upon a common law enfranchisement, the mines and minerals invariably pass by the deed into the tenant, unless they are expressly excepted and reserved to the lord, so that an express exception and reservation thereof is necessary. Also, no right of escheat to the lord—nor, in fact, any ancient service—can be validly reserved upon a common law enfranchisement (*Bradshaw v. Lawson*, 1791, 4 T. R. 443; 2 R. R. 429; *Doe d. Reay v. Huntington*, *supra*). And for these reasons, enfranchisements at common law have been largely superseded by enfranchisements under the Copyhold Acts.

(B) *Enfranchisements under the Copyhold Act, 1894*.—Secondly, as regards enfranchisements under the Copyhold Acts. These enfranchisements are either voluntary or compulsory, *i.e.* either pursuant to an agreement between the lord and the tenant, or merely pursuant to a notice given by either to the other requiring an enfranchisement. These enfranchisements were first authorised, where voluntary, by the Copyhold Act, 1841, 4 & 5 Vict. c. 35; and, where compulsory, by the Copyhold Act, 1852, 15 & 16 Vict. c. 51; and the Copyhold Acts, which prior to the Copyhold Act, 1894, were in force were the Copyhold Acts, 1841, 1853, 1858 (21 & 22 Vict. c. 94), and 1887 (50 & 51 Vict. c. 73). But all such enfranchisements are now effected under the Copyhold Act, 1894, alone (57 & 58 Vict. c. 46), which last-mentioned Act has embodied (with numerous simplifications) all the provisions relative to enfranchisements that were theretofore contained in the prior Copyhold Acts, besides certain other provisions also contained in the prior Acts; and it is now required by the Copyhold Act, 1894, that every enfranchisement, whether voluntary or compulsory, shall be

sanctioned by the Board of Agriculture; and where the enfranchisement is voluntary it is effected by a deed, and where it is compulsory it is effected by an award. And under the Act, lords entitled for limited estates and tenants entitled for limited estates are authorised respectively to make and to accept enfranchisements; and upon any such enfranchisement, whether voluntary or compulsory, the tenant for a limited estate who pays the whole enfranchisement consideration or the whole costs is entitled to charge the enfranchised tenement with the capital sum so expended by him, so that he is eventually recouped the whole of such expenditure, paying only, in the meantime, the interest on the charge. Also, the enfranchisement is and remains valid and effective, irrespectively of the lord's title to the manor, and although that title should afterwards be evicted; and the enfranchisement is in no way affected by the mortgages or charges which affect the manor,—so that there is no need in any case to investigate the lord's title at all. Also, the enfranchisement does not defeat or destroy the right of common—which needs not therefore to be expressly regranted or recreated; and the enfranchisement does not pass to the tenant or include (unless where the deed or award of enfranchisement expresses that it does include) the mines and minerals,—so that there is no occasion in the deed or in the award to expressly except and reserve the mines and minerals to the lord. Also, the right of escheat is, by the express provisions of the Act, reserved to the lord, in case an escheat should afterwards happen of the enfranchised tenement.

Upon a compulsory enfranchisement, the enfranchisement consideration may be either a lump sum payable at once or (at the option of the tenant) a rent charge in perpetuity—and the rent charge may be afterwards redeemed by the tenant; and upon a voluntary enfranchisement, the enfranchisement consideration may be either such lump sum as aforesaid or such perpetual rent charge as aforesaid—according as shall have been agreed; or it may, subject to certain restrictions imposed by the Act, be a conveyance to the lord of other lands, or of mines and minerals, or of the tenant's rights in or over the waste lands of the manor.

And whether the enfranchisement is voluntary or is compulsory, the effect of it, once it is completed, is, to render the land of freehold tenure, holden (like ancient freehold lands are holden) of the lord of the manor, with the incident of escheat annexed, but otherwise freed and discharged of and from all customary rules of descent, and of and from all (if any) customs as to dower (or freebench), or as to the husband's curtesy estate, and of and from all other customs whatever; and the enfranchised land becomes thenceforward subject only to the rules of descent that are applicable to freehold lands, and to the ordinary law as to dower and as to the curtesy estate; and all the old disadvantages attaching to the copyhold tenure (including the old restrictions upon the leasing of the tenement, and upon the user of the tenement, or as regards committing waste thereon) are wholly discharged, unless when they (or any of them) are expressly continued in or by the enfranchisement deed or enfranchisement award. And the tenement, when enfranchised, is held by and according to the title thereto prior to the enfranchisement; and any mortgages upon or leases of the copyhold tenement become mortgages upon and leases of the enfranchised tenement; and any limitations existing in the copyhold tenement prior to its enfranchisement become limitations also of the substituted freehold tenement.

2. *Commutations.*—As regards commutations—as effected under the earlier Copyhold Acts—these were either general or particular,—being

general when they applied to all the copyhold lands within the manor, and being particular when they were only of the copyhold lands of a single tenant; and these commutations were by agreement in every case, and the agreement itself, without more, operated to effect the commutation; but the effect of a commutation was very different from the effect of an enfranchisement—for by the commutation (whether general or particular) the old rents, fines, and heriots were discharged—the lands becoming subject in lieu thereof to either a commutation rent charge or a commutation fine, according as had been agreed; and the timber became the tenant's; but otherwise the lands continued to be held by copy, and were conveyed by surrender and admittance as before, and they remained parcel of the manor as before—discharged nevertheless of and from all customary modes of descent, and of and from all (if any) customs as to freebench or as to the husband's curtesy estate, becoming in these particulars subject to the ordinary law.

3. *Miscellaneous Statutory Enfranchisements.*—Enfranchisements might also be and still may be effected under various other Acts, unconnected (or only distantly connected) with the Copyhold Acts, *e.g.* under the Settled Estates Act, 1877; under the Settled Land Act, 1882; and (in the case of Church lands) under the Ecclesiastical Leasing Acts, 1851 and 1854—or under the Statutes 5 & 6 Vict. c. 108, 21 & 22 Vict. c. 57, and 24 & 25 Vict. c. 105—or under the Glebe Lands Act, 1888; and (in the case of University and College lands) under the Statutes 21 & 22 Vict. c. 44, and 43 & 44 Vict. c. 46; and (in the case of Crown lands) under the Statute 10 Geo. IV. c. 50; and (in the case of Duchy of Lancaster lands) under the Statutes 19 Geo. III. c. 45, and 27 Geo. III. c. 34; and (in the case of Duchy of Cornwall lands) under the Statutes 7 & 8 Vict. cc. 65 and 105; and (in the case of lands taken compulsorily or by agreement by public companies or other public bodies and for public purposes) under the Lands Clauses Consolidation Act, 1848. Also, in many other Acts there will be found inserted provisions of an incidental character providing for the enfranchisement of the lands therein expressed to be thereby dealt with.

[*Authorities.*—The authorities bearing upon the subject of copyholds are—Gilbert on *Tenures*, 5th ed., by Watkins, 1824; Watkins on *Copyholds*, 4th ed., by Coventry, 1825; Elton on *Copyholds*, 2nd ed., 1893; Scriven on *Copyholds*, 4th ed., by Stalman, 1846, and 7th ed., by Brown, 1896; and Brown on *Enfranchisements*, 2nd ed., 1895. See also Bacon's *Abridgment*, Comyn's *Abridgment*, Viner's *Abridgment*, title "Copyhold"; Coke's *Complete Copyholder*; Co. Litt.; the Copyhold Cases in the Reports (Coke's Reports); Kitchyn; Calthorpe; Cruise; Scroggs; and Rouse.]

Copyright.

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Meaning of "Copyright."—The word "copyright" is used in a variety of senses. In its strict sense it denotes the right given by statute to the

authors of published works to prevent any unauthorised republication of "copies" of such works. The name is sometimes given to the common law right of the author of unpublished works to prevent any publication of them without the author's permission. It is applied also, but improperly, to the sole right of dramatic or musical representation conferred by statute on the authors of plays and musical compositions—a right quite distinct from the copyright in the play or piece of music regarded as a book. The latter right existed long before the other was created by statute.

In what Works it exists.—No copyright, or legal right of any kind, exists in works of an immoral, indecent, blasphemous, treasonable, seditious, or libellous character; but in the case of every innocent work of literature and art a copyright may now be said to exist. It exists in the case of books (including under that title, periodicals, magazines, and dramatic and musical compositions), in the cases of prints, paintings, drawings, and photographs, sculpture, models, casts, and busts; also in the case of designs for works of ornament or utility.

Unpublished Works.—Before dealing with the nature, duration, and conditions of the right conferred by statute in each of these cases, a few words may be devoted to what is popularly known as "copyright before publication."

A person may write (books or letters), or sketch or draw, or compose a drama or musical work, without any intention of publishing his work to the world. In such case he has a legally enforceable right to prevent any other person doing so without his consent (see *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q. B. 147). The far-reaching nature of this right is exemplified by the case of *Prince Albert v. Strange* (1848, 2 De G. & Sm. 652), where the defendant was held disentitled to publish even a catalogue of drawings and etchings made by certain members of the Royal Family for their private pleasure (see also *Queensberry v. Shebbeare*, 1758, 2 Eden, 329; *Thompson v. Stanhope*, 1774, Amb. 737). And the recipient of letters can only justify an unauthorised publication of them by showing that the publication is in some way necessary to the vindication of his character (*Pope v. Curl*, 1741, 2 Atk. 342; *Palin v. Gathercole*, 1844, 1 Coll. 565; *Perceval v. Phipps*, 1813, 2 Ves. & Bea. 27; 13 R. R. 1).

This so-called copyright before publication exists quite independently of statute. But in one case—that of lectures—a statutory right is conferred by 5 & 6 Will. IV. c. 65, on the observance of certain conditions. Though the Act expressly excludes from its provisions lectures delivered in a university, public school or college, or on any public foundation, or by anyone in virtue of any gift or endowment, the common law right to prevent the unauthorised publication of such lectures seems to remain unimpaired (see the judgments in *Caird v. Sime*, 1887, 12 App. Cas. 326), that is, in all cases where the circumstances under which they are delivered would raise an implied contract on the part of the audience not to publish them (see *Abernethy v. Hutchinson*, 1825, 1 Ha. & Tw. 28; *Nicols v. Pitman*, 26 Ch. D. 374).

Who may Possess Copyright.—One other preliminary point remains to be considered, viz. what persons are qualified to acquire a copyright. So far as express decision has hitherto gone, the right can only be acquired by those persons who, at the time of publication, owe allegiance either of a permanent or temporary character to the sovereign of these realms, i.e. British subjects wherever resident, and such alien authors as, at the time of publication, are resident in some portion of the sovereign's dominions. But the better opinion now is that an alien may acquire the right by first

publishing his work in the United Kingdom, though not resident in any part of the sovereign's dominions at the time of publication (see the judgments of Lords Cairns and Westbury in the case of *Routledge v. Lowe*, 1868, L. R. 3 H. L. 100; and s. 2 of 33 Vict. c. 14).

First publication in the United Kingdom is essential even in the case of British subjects. If they first publish elsewhere they have no rights other than such as may be acquired under the International Copyright Acts by any foreigner (7 & 8 Vict. c. 12, s. 19). But a simultaneous publication abroad and here will not deprive a person of copyright (*Buxton v. James*, 1851, 5 De G. & Sm. 80).

BOOKS.

Copyright in Books.—A copyright is conferred by 5 & 6 Vict. c. 45 on the author of every published book, including under that word every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published (s. 2; *Johnson v. Newnes*, [1894] 3 Ch. 669).

Copyright is defined to be the "sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which the word is in the Act applied (s. 2).

The copyright of a book published in the lifetime of the author endures for his lifetime and seven years after his death, or for forty-two years, whichever is the longer term. If the work is first published after his death, the copyright endures for forty-two years from the time of first publication (s. 2.)

Copyright extends to all the British dominions. But the Act of 10 & 11 Vict. c. 95 enabled the Crown to suspend, by Order in Council, the prohibitions against importing, selling, etc., foreign reprints of books first published in the United Kingdom, in the case of such colonies as made Acts or ordinances deemed by the Crown sufficient for the protection of British authors.

It is not necessary that the book should possess a literary character or form. Calendars, itineraries, dictionaries, directories, telegraph codes, illustrated catalogues, lists of Stock Exchange prices, and newspapers have all been held to be books within the protection of the Act (*Matthewson v. Stockdale*, 1806, 12 Ves. 276; *Maple v. Junior A. and N. Stores*, 1882, 21 Ch. D. 639; *Cary v. Faden*, 1799, 5 Ves. 23; *Spiers v. Brown*, 1858, 6 W. R. 352; *Kelly v. Morris*, 1866, L. R. 1 Eq. 697; *Morris v. Wright*, 1870, 5 Ch. 279; *Longman v. Winchester*, 1809, 16 Ves. 269; *Exchange Telegraph Co. v. Gregory*, [1896] 1 Q. B. 147; *Walter v. Howe*, 1881, 17 Ch. D. 708). But where the publication is one utterly devoid of literary value, protection is refused, as in the case of mere advertisements, cricket scoring-sheets, and such like (see *Page v. Wisden*, 1869, 20 L. T. 435; *Davis v. Comittee*, 1885, 52 L. T. 539; *Chilton v. Progress Printing Co.*, [1895] 2 Ch. 29; *Hollinrake v. Truswell*, [1894] 3 Ch. 420; *Cable v. Marks*, 1882, 52 L. J. Ch. 107; *Schore v. Schminke*, 1886, 33 Ch. D. 546).

Although the materials of which a book consists may be open to all the world, every person is entitled to a copyright in his own peculiar selection or arrangement of those materials. So also a man is entitled to a copyright in his translation of a foreign work (not protected from translation by the International Copyright Act), though it is open to anyone else to publish an independent translation of his own (*Wyatt v. Barnard*, 1814, 3 Ves. & Bea. 77).

Each really new edition of a book, which is not a mere reprint of the

original, is regarded as a new work (see per Cotton, L.J., in *Thomas v. Turner*, 1887, 33 Ch. D. 292), and a fresh term of copyright begins to run from the date of its publication, at least so far as the new matter is concerned.

Registration.—Registration at Stationers' Hall is not necessary to the existence of copyright; it is only a condition precedent to the right to sue for infringement (5 & 6 Vict. c. 45, s. 24); and the registration may take place after the infringement has occurred.

The registration must state (1) the title of the book; (2) the time of first publication; (3) the name and place of abode of the publisher; (4) the name and place of abode of the proprietor of the copyright (s. 13).

Registration in the name of a mere agent or nominee of the proprietor of the copyright is not sufficient (*Petty v. Taylor*, [1897] 1 Ch. 465; *London Printing Alliance v. Cox*, [1891] 3 Ch. 291), though registration in the name of a trustee in whom the copyright is vested would be (*id.*). It would seem sufficient in the case of a publishing firm to give, as the place of abode, the place where their business is carried on (per Field, J., *Nottage v. Jackson*, 1884, 49 L. T. 340).

The registration must be correct in all particulars. Several actions have failed by reason of slight and what might appear unimportant errors in the registration. It would be a desirable amendment of the law to make fatal such errors only as could be shown to have misled the defendant.

It appears doubtful whether it is necessary for an assignee to register before suing.

Each new edition of a book must be registered if it is intended to sue for a piracy of it (*Murray v. Bogue*, 1852, 1 Drew. 365).

Certified copies of the entries at Stationers' Hall are *prima facie* proof of what they purport to be (s. 11).

Delivery of Copies.—The Act requires (under a penalty) the delivery of a copy of every published book to the British Museum, and to certain libraries (ss. 6–10); but neglect of this duty does not affect the author's copyright.

Crown and College Copyright.—The Crown possesses, jointly with the Universities of Oxford and Cambridge, the exclusive right of printing, publishing, and selling copies of the Bible and the Book of Common Prayer.

The Crown also possessed the exclusive right of printing and publishing Acts of Parliament; but this right seems to be now abandoned (see the Treasury Minute of 31st August 1887).

The Crown copyright is not infringed by publishing any of these works with *bona fide* notes.

The Crown still asserts its right to the exclusive publication of charts and ordnance maps, and in the case of such works as the Rolls publications, State trials, and the Board of Trade Journal (see the Treasury Minute above referred to).

There is no limit to the duration of Crown copyright.

Periodicals.—All periodicals are "books" within the meaning of the Act 5 & 6 Vict. c. 45; but the law with respect to them is, in some respects, peculiar.

The proprietor of the periodical possesses the copyright in such parts of it only as have been composed on the terms that the copyright therein shall belong to him, and which he has actually paid for (s. 18).

The Courts have in some cases implied these "terms" (*Sweet v. Benning*, 1855, 16 C. B. 459; cp. the judgments in *Lamb v. Evans*, [1893] 1 Ch. 218), but in other cases have required express proof of them (*Walter v. Howe*,

1881, 17 Ch. D. 708; *Trade Auxiliary Co. v. Middlesborough Association*, 1889, 40 Ch. D. 425).

The copyright in all articles so composed for the proprietor of the periodical is to belong to him only for the term of twenty-eight years: after that period it is to revert to the authors for the remainder of the term given by the Act in the case of books (s. 18).

And the proprietor of the periodical is not entitled to publish any contribution in a separate form without the consent of the writer (*id.*; see *Mayhew v. Maxwell*, 1860, 1 John. & H. 312; *Smith v. Johnson*, 1863, 4 Giff. 632).

A contributor who expressly reserves to himself the right to publish his composition in a separate form is entitled to the copyright in it, without prejudice to the right of the proprietor of the periodical (s. 18); but without such reservation he cannot republish within the twenty-eight years without the consent of the proprietor of the periodical (*Hildesheimer v. Dunn*, 1891, 64 L. T. 452).

In the case of periodicals it is sufficient to register the first volume, number, or part (s. 19).

Newspapers come under this heading (see *Walter v. Howe*, *ubi supra*).

ENGRAVINGS OR PRINTS.

The Acts of 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57 (extended to Ireland by 6 & 7 Will. IV. c. 59, s. 2), taken together, confer a copyright in any print engraved, etched, or worked in mezzotinto or *chiaro-oscuro*.

But every such engraving or print must (1) have been engraved, etched, etc., in some part of Great Britain, and (2) must be truly engraved with the name of the proprietor on each plate and printed on every such print (8 Geo. II. c. 13). These words were at one time thought to be merely directory, but the later cases have decided that without a strict observance of them no copyright exists (*Brookes v. Cock*, 1835, 3 Ad. & E. 138; *Newton v. Cowie*, 1827, 4 Bing. 234).

The latter requisite is not necessary for the protection of engravings forming part of a book as illustrations (*Boque v. Houlston*, 1852, 5 De G. & Sm. 267; *Maple v. Junior Army and Navy Stores*, 1882, 21 Ch. D. 369).

The copyright is conferred upon the person who has invented or designed, graved, etched, or worked, whether from his own work or not, or who has engraved or caused to be engraved (see *Stannard v. Harrison*, 1871, 24 L. T. 570).

Provided the name or one of the names engraved be in fact that of the proprietor, it is not necessary that he should be described as such; he may even be erroneously described, not as proprietor, but as publisher (*Graves v. Ashford*, 1867, L. R. 2 C. P. 421; *Newton v. Cowie*, 1827, 4 Bing. 234; *Blackwell v. Harper*, 1740, 2 Atk. 93).

The copyright endures for twenty-eight years from the day of first publication (7 Geo. III. c. 38, s. 7).

The provisions of the above-mentioned Acts were, by 15 & 16 Vict. c. 12, made applicable to prints "taken by lithography or any other process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely."

No Act requires the registration of engravings or prints as a preliminary to suing or otherwise.

Maps were at one time regarded as engravings or prints, but the law would seem to have been altered by the definition of "book" given in 5 &

6 Vict. c. 45, s. 2 (*ante*, p. 394), so that it would now be unsafe to leave them unregistered in case of proceedings for piracy (see per James and Mellish, LL.J., in *Stannard v. Lee*, 1871, 6 Ch. 349).

SCULPTURE, MODELS, AND BUSTS.

The Act of 54 Geo. III. c. 56 confers a copyright on the authors of new and original sculptures, models, copies, or casts, provided that the proprietor or proprietors do cause his or their name or names, with the date, to be put on every such sculpture, etc., before it is put forth or published (s. 6).

The copyright lasts for fourteen years from the first putting forth or publishing, with an additional term of fourteen years to the original author, if he is alive at the expiration of the former term (*id.*).

No enactment requires registration.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

The Act of 25 & 26 Vict. c. 68 first conferred a copyright on the authors of original paintings, drawings, and photographs.

Every painting, drawing, or photograph is an original one if taken by independent effort from a non-copyright subject; but the copyright which exists in every such painting, etc., is not to prevent any other person from similarly painting, drawing, or photographing the same subject by independent effort (s. 2).

If the painting, drawing, or photograph be made for or on behalf of any other person for a good or valuable consideration, the copyright belongs to such person (s. 1). See *Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531; *Petty v. Taylor*, [1897] 1 Ch. 465.

But a purchaser or assignee from the original author is not entitled to the copyright unless it is conferred on him by writing. Neither in such a case does the author retain the copyright unless he expressly reserves it to himself by agreement in writing (s. 1). If neither of these things is done, the copyright ceases to exist.

The copyright endures for the life of the author and seven years after his death (s. 1).

Where several persons assist in the taking of a photograph we have no clear guide in determining which of them is the "author." See an attempted definition by Lord Esher, M. R., in *Nottage v. Jackson*, 1883, 11 Q. B. D. 633; and *cp. Kenrick v. Lawrence*, 1890, 25 Q. B. D. 106; and *Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531. A firm or company, though the common employer of all these persons, cannot be regarded as such author (*Nottage v. Jackson*, *ubi supra*).

Paintings, drawings, and photographs should be registered at once, as (unlike the case of books) no legal proceeding can be taken in respect of anything done before registration (s. 4). But the copyright exists, and may be transferred and retransferred before registration (per Lord Esher, M. R., *Tuck v. Priest*, 1887, 19 Q. B. D. 636).

The entry at Stationers' Hall must give the name and place of abode of the author, together with a short description of the nature and subject of the work (s. 4). A sketch, outline, or photograph may also be added if desired (*id.*).

In the case of a firm it is enough to register the firm's name, without giving the names of the partners (*Rock v. Lazarus*, 1872, L. R. 15 Eq. 104); and the "place of abode" is sufficiently described by giving the firm's place of business (per Field, J., *Nottage v. Jackson*, 1883, 49 L. T. 339).

Any person "aggrieved" may apply to have the registration varied or expunged (s. 5). A person "aggrieved" is someone setting up a right inconsistent with that of the person registered—having some substantial (and not merely technical) objection—one going to the merits of the registered proprietor's title (per Blackburn and Hannen, JJ., *Grave's case*, 1869, L. R. 4 Q. B. 724).

As to the sufficiency of the "short description" of the nature and subject of the work, see the judgments in *Ex parte Beal*, 1868, 9 B. & S. 395.

DESIGNS.

Copyright in designs (which must be new and original, see *In re Clarke's Design*, [1896] 2 Ch. 38) can only be acquired by obtaining registration of them.

For this purpose application must be made to the Comptroller in the manner provided by the Act of 46 & 47 Vict. c. 57 (Parts III. and V.), which repeals all previous legislation on the subject.

Any detailed exposition of the minute directory provisions of this Act, or of the Designs Rules, 1883, would be unsuited to the present publication.

An appeal lies to the Board of Trade from the refusal of the Comptroller to register.

The registered proprietor has a copyright enduring for five years from the date of registration.

The requisites to copyright are the following:—(1) The design must be new and original; (2) it must be registered; (3) neither it nor any article to which it is applied must have been previously exhibited, nor any description of it published otherwise than as allowed by sec. 57; (4) before sale the prescribed number of exact representations or specimens must be furnished to the Comptroller.

As to the marking before sale of any articles to which a registered design has been applied and the consequence of not so applying it, see sec. 51, and r. 32.

A body corporate may be registered as proprietor by its corporate name (r. 27).

The High Court may, on the application of any person aggrieved, order any entry on the register to be varied or expunged (s. 90). See DESIGNS.

RIGHT OF DRAMATIC AND MUSICAL REPRESENTATION.

A drama or musical composition is a "book"; and, regarded as such, everything already said as to the copyright in books applies to each of them (see *Bach v. Longman*, 1777, 2 Cowp. 623).

A public performance of a drama or musical composition is not an infringement of the copyright in it (*Murray v. Elliston*, 1822, 5 Barn. & Ald. 657; 24 R. R. 519; *Coleman v. Wathen*, 1793, 5 T. R. 245); and down to the year 1833 the author had no means of preventing the public performance of his work. A new right was conferred upon him—with respect to dramas—in that year by the Act of 3 Will. IV. c. 15, viz. the sole right of representing his dramatic piece at any place of dramatic entertainment; a right extended to musical compositions by 5 & 6 Vict. c. 45, s. 20, without the restrictive words, "at any place of dramatic entertainment" (see *Wall v. Taylor*, 1882, 11 Q. B. D. 102).

This right is not affected by the publication as a book of the dramatic or musical composition (*Chappell v. Boosey*, 1882, 21 Ch. D. 232).

In the case of musical compositions a later Act (45 & 46 Vict. c. 40) requires the proprietor of this exclusive right to print on the title-page of

every published copy of the composition a notice to the effect that the right of public representation or performance is reserved. As to the consequence of not doing so, see *Fuller v. Blackpool Winter Gardens, etc., Co.*, [1895] 2 Q. B. 429.

The sole right of dramatic or musical representation or performance is of equal duration with the term of an author's copyright in books, i.e. the author's lifetime and seven more years if they together amount to or exceed forty-two years; if they do not, then it endures for the term of forty-two years from the date of first public representation or performance (5 & 6 Vict. c. 45, s. 20).

Registration is not necessary either as a preliminary to suing or otherwise, so far as the sole right of dramatic representation is concerned. Notwithstanding the decision in *Russell v. Smith* (1848, 12 Q. B. 237), it is doubtful, on the construction of sec. 24 of 5 & 6 Vict. c. 45, whether the same thing can be said with reference to the sole right of musical performance.

As to what constitutes a dramatic piece, the following cases may be consulted: *Lee v. Simpson*, 1847, 3 C. B. 871; *Russell v. Smith*, 1848, 12 Q. B. 217; *Fuller v. Blackpool Winter Gardens, etc., Co.*, [1895] 2 Q. B. 429.

TRANSFER OF COPYRIGHT.

The transfer of copyright may be effected either (1) by operation of law, or (2) by voluntary assignment.

(1) Copyright is personal property (5 & 6 Vict. c. 45, s. 25), and may be bequeathed by will. In case of intestacy it devolves upon the personal representative or representatives of proprietor. In case of the owner's bankruptcy it vests in the trustee for his creditors (*Mawman v. Tegg*, 2 Russ. 392; *Longman v. Tripp*, 1826, 2 Bos. & Pul. 67; 9 R. R. 617).

The copyright in the various parts of an encyclopædia, review, etc., vests, without assignment, in the proprietor, where they have been composed on the terms that the copyright should belong to him, and where they have been paid for (5 & 6 Vict. c. 45, s. 18). And the copyright in a painting, drawing, or negative of a photograph executed for another person for a valuable consideration, vests in such person without assignment (25 & 26 Vict. c. 68, s. 1).

(2) *Assignment*.—Copyright may be assigned for part of its duration; but though divisible as to time it is not divisible as to locality (see the judgments in *Jefferys v. Boosey*, 1854, 4 H. L. 815). A licence by the proprietor of the sole right of dramatic or musical representation may, however, be locally limited.

The copyright in books may be assigned either (a) by writing, or (b) by an entry of assignment in the book of registry at Stationers' Hall in accordance with the provisions of sec. 13 of 5 & 6 Vict. c. 45. When assigned by writing, the document need not be under seal or attested by witnesses (*Cumberland v. Copeland*, 1862, 1 H. & C. 194).

An assignment of the copyright in prints or engravings seems to require a writing signed by the proprietor with his own name, in the presence of and attested by two or more credible witnesses (17 Geo. III. c. 57).

The copyright in works of sculpture can only be assigned by deed signed by the proprietor in the presence of, and attested by, two or more witnesses (54 Geo. III. c. 156, s. 4).

In the case of paintings, drawings, or photographs, an assignment of copyright must be by some note or memorandum in writing signed by the proprietor, or by his agent appointed for that purpose in writing (25 & 26 Vict. c. 68, s. 3).

The copyright in designs was, under the repealed Acts, transferable by writing. The present Act (46 & 47 Vict. c. 57) contains no provision on the subject.

The sole right of dramatic or musical representation requires a writing for its assignment (*Shepherd v. Conquest*, 1856, 17 C. B. 427).

An assignment of the copyright in a book consisting of or containing a dramatic or musical composition does not carry with it the right of representation or performance (5 & 6 Vict. c. 45, s. 22).

A licence to perform must be in writing (3 Will. IV. c. 15, s. 2).

INFRINGEMENT OF COPYRIGHT.

Books.—The copyright in books is infringed by any such unauthorised reproduction of the pirated work as interferes with the profit and enjoyment which the proprietor derives from it.

A reproduction for gratuitous distribution is as much an infringement as one for pecuniary profit (*Novello v. Suddow*, 1852, 12 C. B. 177). But a public recitation of a work is not an infringement of the copyright in it (*Coleman v. Wathen*, 1793, 5 T. R. 245).

A *bond fide* abridgment does not constitute an infringement of copyright (*Gyles v. Wilcox*, 1740, 2 Atk. 145; *Tonson v. Walkner*, 1739, 2 Atk. 143); that is, a work containing substantial condensation of the materials and intellectual labour and judgment (see Lofft's Rep. 775, and *Read v. Hodges* referred to, 1740, 3 Swans. 679). But this does not apply to works of fiction (*Dickens v. Lee*, 1844, 8 Jur. 183). Legal digests are regarded in the same way as abridgments.

And the addition of *bond fide* notes or comments may justify the republication of another's work where—in the language of Lord Ellenborough—the object is to convey to the public the notes and observations fairly, and not merely to colour the publication of the original work, and make the notes and observations a pretext for pirating it (*Cary v. Kearsley*, 4 Esp. 169; cp. *Campbell v. Scott*, 1842, 11 Sim. 31, where the disproportion between the quantity of the notes and that of the original work induced the Court to hold that a piracy had been committed).

Quotation from the work of another is also allowable, provided it be not excessive (see *Pike v. Nicholas*, 1870, L. J. Ch. 529; L. R. 5 Ch. 251; cp. *Roworth v. Wilkes*, 1807, 1 Camp. 94; 10 R. R. 642). And, as observed by Lord Cottenham (*Bramwell v. Holcomb*, 1836, 3 Myl. & Cr. 738), not only quantity but value must be looked at; for one writer might take all the vital part of another's work, though only a small quantity of it.

The question of piracy is always one of fact to be determined with reference to the particular circumstances of each individual case.

An *animus furandi* is not essential to piracy. It is enough that the work complained of is, in substance, a copy, whereby a work vested in another is prejudiced (Lord Ellenborough in 1 Camp. 98; Wood, V.C., in *Scott v. Stanford*, 1867, L. R. 3 Eq. 718).

Where the materials of which a work consists are open to all the world—as in the cases of directories, dictionaries, charts, itineraries, calendars, etc.—it is allowable for any person to publish an independent arrangement of them. But it is piracy merely to copy the arrangement published by another person (*Morris v. Wright*, 1870, L. R. 5 Ch. 279; *Pike v. Nicholas*, 1869, L. R. 5 Ch. 251). The piracy is frequently discovered by the reproduction of errors or misprints—a fact which furnishes irresistible evidence of a servile copying.

A retranslation into English of a foreign translation of an English

work is an infringement of the copyright in such work (*Murray v. Bogue*, 1852, 1 Drew. 353).

The copyright in a drama may be infringed by the publication of another drama, though the latter be founded on a novel into which the original drama had been expanded (*Reade v. Lacy*, 1861, 1 John. & H. 527). But if the novel had been published first the case might be different (*Toole v. Young*, 1874, L. R. 9 Q. B. 523).

Though the performance of a drama founded on a novel is not an infringement of the copyright in the novel, the publication of the drama as a book may amount to such an infringement (*Tinsley v. Lacy*, 1863, 1 Hem. & M. 747). And where a drama reproduced *verbatim* considerable passages from the novel, Stirling, J., ordered the defendant to deliver up for cancellation all copies of it in his possession or power (*Warne v. Seebohm*, 1888, 39 Ch. D. 73).

Where prints form part of a book they are within the protection afforded to books (*Bogue v. Houlston*, 1852, 5 De G. & Sm. 267; *Bradbury v. Hotton*, 1872, L. R. 8 Ex. 1).

All published musical pieces (with or without words) are books within the meaning of 5 & 6 Vict. c. 45. It would be an infringement of the copyright in an opera to publish its airs in the form of quadrilles or waltzes (*D'Almaine v. Boosey*, 1835, 1 Y. & C. C. 289).

The copyright in books may also be infringed by the importation into any part of the British dominions of any pirated copy for sale or hire, or by knowingly selling, publishing, or offering for sale or hire, or having in possession for sale or hire any such pirated copy (5 & 6 Vict. c. 45, s. 17).

The copyright in a book is not infringed by the application of its title to another work. But this, wherever it would tend to mislead an ordinary purchaser, is, nevertheless, a legal wrong; and in many cases the Courts have interfered to restrain the defendant from offering to the public a work so like the plaintiff's in title as to be likely to mislead a purchaser of ordinary intelligence into thinking that he was buying the plaintiff's work. This, said James, L.J., is "common law fraud, and can be redressed by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts (*Dicks v. Yates*, 1881, 18 Ch. D. 90).

Periodicals.—Periodicals, being "books" within the meaning of the Acts, the copyright in them may be infringed in the same manner as that in other books.

But, further, the contributions of any author cannot be separately republished without his consent, even during the period (twenty-eight years) that the copyright may be vested in the proprietor of the periodical (5 & 6 Vict. c. 45, s. 18; *Smith v. Johnson*, 1863, 4 Giff. 632).

Engravings and Lithographs.—The copyright in engravings and lithographs is infringed by in any manner copying them in whole or part, by varying, adding to or diminishing from the main design; also by importing for sale, or causing or procuring to be published, sold, or otherwise disposed of, any copies engraved, etched, drawn, or designed in any part of Great Britain, without the consent of the proprietors in writing, signed by them in the presence of, and attested by, two or more credible witnesses (17 Geo. III. c. 57).

These provisions extend to lithographs (14 & 15 Vict. c. 12, s. 14).

To constitute a piracy on the part of those who make copies, a guilty knowledge is requisite; but in the case of those who sell, or import for sale,

this is not necessary (*West v. Francis*, 1822, 5 Barn. & Ald. 737; 24 R. R. 541).

Though the author of an engraving of a print is entitled to prevent anyone else from copying his engraving, he cannot prevent an independent engraving of the original print or subject-matter.

A small photograph of a large print may amount to a piracy of it (*Gambart v. Ball*, 1863, 14 C. B. N. S. 742); but a pattern for wool work taken from a print would not be so regarded (*Dicks v. Brooks*, 1880, 15 Ch. D. 35). And in a somewhat old case (decided before 25 & 26 Vict. c. 68, s. 6), the making and publicly exhibiting for money a large painted dioramic copy of a print was held not to amount to an infringement of the copyright in it (*Martin v. Wright*, 1833, 6 Sim. 297).

Where prints have been unlawfully struck off from the original plate, the sale of them does not amount to an infringement of copyright, though an action for damages might lie against the person who so unlawfully struck them off (*Murray v. Heath*, 1831, 1 Barn. & Adol. 804).

Sculpture, Models, and Busts.—The copyright in sculpture, models, and busts is infringed by making or importing, or causing to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or cast, however made, to the detriment of the proprietor or proprietors (54 Geo. III. c. 56, s. 3).

A *tableau vivant* representation of a statue is not an infringement of copyright in the statue (*Hanfstaengl v. Empire Theatre*, [1894] 2 Ch. 1).

Paintings, Drawings, and Photographs.—The copyright in paintings, drawings, and photographs is infringed by making, copying, colourably imitating, or otherwise multiplying them or the design thereof for sale, hire, exhibition, or distribution (25 & 26 Vict. c. 68, s. 6); also by importing, selling, letting to hire, exhibiting, or distributing any copies known to have been unlawfully made (*id.*).

As to the meaning of the words "or the design thereof," see the judgments in *Hanfstaengl v. Baines & Co.*, [1895] App. Cas. 20.

The copyright is infringed by the sale or hire, after registration, of copies made abroad before registration (*Tuck v. Priester*, 1887, 19 Q. B. D. 629).

An unauthorised photograph of the engraving of a picture is an infringement of the copyright in the picture (*Ex parte Beal*, 1868, 9 B. & S. 395).

Besides the infringement of their copyright, the Act also forbids, under a penalty, other wrongs to which artists were exposed, viz. (1) fraudulently affixing any name, initials, or monogram; (2) fraudulently selling or exhibiting, with the name, initials, or monogram affixed, of a person who did not execute the work; (3) fraudulently uttering copies or imitations of a work as having been executed by the author of the original work; (4) fraudulently selling or publishing, during the life of the author, as and for the unaltered work of such author, any painting, in which an alteration has been made by any other person, or any copies of it (25 & 26 Vict. c. 68, s. 7).

Designs.—The copyright in designs is infringed (1) by the unauthorised application of a design, or any fraudulent or obvious imitation of it, in the class or classes of goods in which such design is registered, for purposes of sale, to any article of manufacture or to any substance, artificial or natural, or partly artificial and partly natural; also (2) by publishing or exposing for sale any article of manufacture, or any substance to which such design or any fraudulent or obvious imitation of it, has been so applied,

with knowledge that it has been so applied without the consent of the registered proprietor (46 & 47 Vict. c. 47, s. 58; *Harper v. Wright & Butler, etc., Co.*, [1896] 1 Ch. 142; *In re Clarke's Design*, [1896] 2 Ch. 38).

Right of Dramatic and Musical Performance.—The sole right of dramatic performance is infringed by representing or causing to be represented, the drama, or any part thereof, without the proprietor's written consent, at any place of dramatic entertainment in any part of the British dominions (3 & 4 Will. IV. c. 15, s. 2).

The consent may be given by an authorised agent (*Moreton v. Copeland*, 1855, 16 C. B. 517). But a part-owner cannot give authority without the consent of his co-owners (*Powell v. Head*, 1879, 12 Ch. D. 686).

The sole right of musical performance is infringed by any unauthorised performance or representation of the musical composition (5 & 6 Vict. c. 45, s. 20).

To constitute an infringement of the sole right of dramatic representation by representing merely a part of the drama, the part must be a material and substantial part (*Chatterton v. Cave*, 1878, 3 App. Cas. 483).

In the case of dramatic compositions the unauthorised representation, in order to constitute an infringement of proprietary right, must be at some "place of dramatic entertainment." But any place may on occasion become such, though ordinarily used for different purposes. Some judges appear to have thought that not only must the place be public, but the representation must also be for profit (Lord Coleridge, *Duck v. Bates*, 1884, 12 Q. B. D. 79; and see the judgments in *Russell v. Smith*, 1848, 12 Q. B. 217). But the element of profit is clearly not necessary; for a rival company by giving a gratis performance might do a still greater injury than by giving a performance for profit (see per Lord Esher, M. R., *Duck v. Bates*, 1884, 13 Q. B. D. 846). It is not easy to define accurately what species of performance is prohibited by the statute. But it must be not merely a "domestic or internal" representation—a representation for the amusement of one's family or immediate friends; it must be a performance (not necessarily for profit) for the entertainment of the public as such, or a limited portion of the public (see the judgments of Lord Esher, M. R., and Bowen, L.J., in *Duck v. Bates*, *ubi supra*).

In the case of musical compositions (not dramatic), the proprietary right is infringed by an unauthorised "performance" *anywhere* (*Wall v. Taylor and Wall v. Martin*, 1883, 11 Q. B. D. 102); but what constitutes a "performance" is left in doubt. Singing or playing for one's own gratification is not a performance (see per Lord Esher, *ibid.*). Some element of publicity seems necessary.

The offence may be committed without any guilty knowledge on the part of the offender (*Lee v. Simpson*, 1847, 3 C. B. 883).

The offence is not committed by a person who lets a room to others who give the entertainment, but who does not by himself or his agent take any part in the performance (*Russell v. Briant*, 1849, 8 C. B. 836), even though he receives as remuneration a proportion of the receipts (*Lyons v. Knowles*, 1863, 3 B. & S. 556). But a person who let his company of actors and actresses, with scenery, etc., to another person for a benefit performance, was held liable (*Marsh v. Conquest*, 1864, 35 L. J. C. P. 319).

51 & 52 Vict. c. 50, s. 3, now provides that the proprietor, tenant, or occupier of the place where an unauthorised performance of any musical composition takes place shall not be liable to any penalty or damages, unless he wilfully causes or permits such unauthorised performance, knowing it to be unauthorised.

REMEDIES FOR INFRINGEMENT.

Books.—In the case of infringement of copyright in books, the proprietor has several remedies open to him. He may maintain (1) an action for damages, (2) an action for the recovery of pirated copies or damages for the detention or conversion thereof, (3) an action for an injunction, and he may claim all these remedies in the same action; (4) he may have the importation of pirated copies stopped at the Custom-house (see CUSTOMS).

The remedy by special action for damages is given by sec. 15 of 5 & 6 Vict. c. 45, in language which at first sight might seem to confine it to cases where the book had been "printed for sale, hire, or exportation." But it was held in *Novello v. Suddlow* (1852, 12 C. B. 177) that this section did not take away the common law remedy by action where copies were multiplied by modes not enumerated in that section, *e.g.* where copies were made by lithography and gratuitously distributed.

The proprietor may also, after demand thereof in writing, recover by action all copies unlawfully printed or imported, and damages for the detention thereof in an action of detinue; or he may recover damages in trover for the conversion thereof (s. 23).

In an action for damages for infringement of copyright, the defendant must, on pleading, give notice in writing of any objections on which he means to rely; and if he denies the petitioner's authorship or proprietorship he must state the name of the author, proprietor, or first publisher, with the title of the work, and the time and place of first publication (s. 16). But this is not necessary in an action for detinue or trover of copies under sec. 23 (*Hole v. Bradbury*, 1879, 12 Ch. D. 886).

An objection to plaintiff's title that some other person, whose name the defendant could not give, was the proprietor of the copyright, was held insufficient (*Boosey v. Davidson*, 1849, 4 Dow. & L. 147; but see the judgments in *Boosey v. Purday*, 1846, 10 Jur. 1038).

Interrogatories may be delivered as in other actions. They have been allowed as to the original sources from which the petitioner says that he drew his book (*Kelly v. Hyman*, 1869, 17 W. R. 399), and as to the number of copies sold for a limited period before and after the date of infringement, for the purpose of enabling the defendant to pay into Court a sum sufficient to meet the damage sustained (*Wright v. Goodlake*, 1866, 13 L. T. 120).

All proceedings must be commenced within twelve calendar months after the offence is committed (s. 26); but this enactment has been held not to be a bar to an action for an injunction to restrain the further printing or publishing of piratical copies (*Hogg v. Scott*, 1874, L. R. 18 Eq. 444, following certain Scotch cases referred to therein).

An injunction may be perpetual, or merely interlocutory. An interlocutory injunction is granted on the terms that the petitioner gives an undertaking as to damages.

Where the work complained of is of a transitory nature—such as a calendar—the chief value of which depends on its appearing immediately, an interlocutory injunction will generally be refused; but the defendant may be ordered to keep an account of all copies sold (*Spottiswoode v. Clarke*, 1846, 2 Ph. Ch. 156; *Matthewson v. Stockdale*, 1806, 12 Ves. 275; *Cox v. Land and Water Journal Co.*, 1869, L. R. 9 Eq. 324).

Laches or acquiescence on the part of the plaintiff will disentitle him to an injunction (*Saunders v. Smith*, 3 Myl. & Cr. 711; *Rundell v. Murray*, 1821, 1 Jac. 311; 23 R. R. 75). And the Court will sometimes refuse one by

reason of the maxim *de minimis* (*Bell v. Whitehead*, 1839, 3 Jur. 68; *Whittingham v. Wooler*, 1817, 2 Swans. 428).

Damages may be given either in addition to or in substitution for an injunction (21 & 22 Vict. c. 27, s. 2).

The right to an account is ancillary to the right to an injunction (1 Kay, 417; *Barry v. Stevens*, 1862, 31 Beav. 258).

The proprietor of copyright is also entitled to half the penalty of £10 inflicted by sec. 17 for every offence against that section, viz.: on persons (a) importing pirated copies, or (b) knowingly selling, publishing, or offering for sale any such copies, or (c) having them in possession for sale or hire—to be recovered by summary proceeding before justices.

Every such copy becomes forfeited, and is to be seized and destroyed by the officer of Customs or Excise (s. 17).

Engravings and Prints.—The remedies for infringement of the copyright in engravings and prints are (1) by action for forfeiture and penalty, (2) by summary proceedings for the same, (3) by action for damages, (4) by action for injunction, which may be combined with a claim for damages.

8 Geo. II. c. 13 inflicts the penalty of forfeiting the plates on which the prints have been copied, and every sheet on which they are copied, to the proprietor of the original prints; also the sum of five shillings for every pirated copy found in the offender's custody, either printed or published and exposed to sale, or otherwise disposed of contrary to the intent of the Act—half to go to the Crown, and the other half to the person suing for it.

Both the pecuniary penalty and the unlawful copies may be recovered, either (1) by action, or (2) by summary proceeding before justices (25 & 26 Vict. c. 68, s. 8).

A further remedy by action for damages is given by 17 Geo. II. c. 57, in which it is not necessary to prove a guilty knowledge on the part of the defendant (*West v. Francis*, 1822, 5 Barn. & Ald. 737; 24 R. R. 541; *Gambart v. Sumner*, 1859, 5 H. & N. 5).

The double costs given by this Act are now taken away in all cases (5 & 6 Vict. c. 97).

An action must be brought within six calendar months after the offence committed (7 Geo. III. c. 38).

Sculpture, Models, and Busts.—The remedies are (1) action for damages, (2) injunction.

All actions must be commenced within six calendar months next after the discovery of the offence (54 Geo. III. c. 56, s. 5).

Paintings, Drawings, and Photographs.—The remedies for infringement are (1) by action, and (2) by summary proceeding before justices.

An action may be brought (a) to recover damages, or (b) penalties, together with, in either case, all unlawful copies forfeited pursuant to the Act. The action may also claim an injunction and an account.

The offender is to forfeit £10 for every one of the following offences: (1) without the consent of the copyright proprietor, repeating, copying, colourably imitating, or otherwise, for sale, hire, exhibition, or distribution; (2) importing, selling, or offering for sale, letting to hire, exhibiting or distributing any copy unlawfully made, knowing that it has been so made (s. 6).

These penalties (as well as all others inflicted by the Act) may be recovered either by action or by summary proceeding before justices having jurisdiction where the offender resides (s. 8).

All unlawful copies may likewise be recovered in either manner (*id.*).

On the question of venue an action to recover penalties must be laid

in the county where the offence was committed. See the cases of *Lewis v. Davis*, 1875, L. R. 10 Ex. 89, and *Buckley v. Hull Docks Co.*, [1893] 2 Q. B. 93.

An offender who has incurred these penalties cannot get rid of them by composition with his creditors (*Ex parte Graves*, 1868, L. R. 3 Ch. 642).

Designs.—The remedies for infringement are (1) an action for the penalty (not exceeding £50) for every offence against sec. 58 of the Act, (2) an action for damages under sec. 59, in either of which an injunction may also be claimed.

Right of Dramatic and Musical Performance.—The earlier Acts gave to the proprietor of the sole right of either dramatic or musical representation or performance the right to recover by action (a) an amount not less than 40s. for every unauthorised representation or performance, or (b) the full amount of the benefit or advantage arising from such representation, or the injury or loss thereby sustained, whichever should be the greater damage (3 Will. iv. c. 15, s. 2; 5 & 6 Vict. c. 45, ss. 20, 21).

This was altered by 51 & 52 Vict. c. 17, which provides that the amount recoverable shall be such sum or sums as shall, in the discretion of the Court or judge, be reasonable; and the sum awarded may be nominal if the justice of the case so requires (s. 1). And the costs are likewise to be in the absolute discretion of the judge (s. 2).

An injunction may also be claimed.

All actions must be brought within twelve calendar months after the offence committed (3 Will. iv. c. 15, s. 3).

Interrogatories may be administered even in an action to recover the so-called penalty, which is rather in the nature of liquidated damages (*Adams v. Batley*, 1887, 18 Q. B. D. 625).

If the notice required by sec. 2 of the Copyright (Musical Compositions) Act, 1882, is not given and printed upon the published copies, no penalty or damages can be recovered (*Fuller v. Blackwall Winter Gardens, etc., Co.*, [1895] 2 Q. B. 429).

INTERNATIONAL COPYRIGHT.

International copyright is altogether dependent on statutory enactments of the present reign. Four International Copyright Acts in all have been passed, of which the first (1 & 2 Vict. c. 59), relating to books only, was repealed by the second (7 & 8 Vict. c. 12), the latter being amended and partly repealed by 15 Vict. c. 12. The last (49 & 50 Vict. c. 33) was passed in 1886, after the holding of an International Conference at Berne, where the draft of a Copyright Convention had been agreed upon. See BERNE CONVENTION, under which heading a short survey of the law of international copyright from the historical point of view is taken. The last-mentioned Act and the previous Acts are (so far as unrepealed) to be construed together (49 & 50 Vict. c. 33, s. 1, subs. 3).

The Acts enable the Crown, by Order in Council, to grant a copyright in the case of foreign books, prints, articles of sculpture, and other works of art, where the foreign country has made provisions for the sufficient protection of the authors of works first published in the United Kingdom. But this shall not confer on any person any greater right or larger term of copyright in any work than that enjoyed in the foreign country where it was first published (Act of 1886, s. 2).

By sec. 3 of the International Copyright Act of 1844 (7 & 8 Vict. c. 12) all the provisions of the Copyright Act of 1842 (5 & 6 Vict. c. 45) are to apply to the books to which the Order in Council extends, "in such and

the same manner as if such books were first published in the United Kingdom." This has been held to give the owner of the British international copyright the right (under ss. 15 and 17 of the last-mentioned Act) to prevent the importation into this country of copies lawfully printed in the foreign country in which the book was first published, notwithstanding the exception contained in sec. 10 of the former Act (*Pitt Pitts v. George & Co.*, [1896] 2 Ch. 866).

In accordance with the provisions of the International Copyright Acts above mentioned, an Order in Council was issued in November 1887, to come into force on the following 6th of December, giving effect throughout Her Majesty's dominions to the Berne Convention, which had been ratified in the previous September by this country and the following foreign countries, viz. Belgium, France, Germany, Hayti, Italy, Spain, Switzerland, and Tunis—called collectively the Copyright Union.

This Order in Council gives (subject to the limitations mentioned in sec. 2 of the Act of 1886) to the authors of literary or artistic works thereafter first produced in any of the countries of the Union, the same copyright throughout Her Majesty's dominions as if the work had been first produced in the United Kingdom. English authors have corresponding rights in the countries of the Union.

The rights conferred by the Berne Convention extend to works produced before it came into operation, provided they had not at that time fallen into the public domain of the country of origin (Art. 14; see *Lauri v. Renad*, [1892] 3 Ch. 402, and *Hanfstaengl v. American Tobacco Co.*, [1895] 1 Q. B. 347).

If the author of a foreign work is not a subject or citizen of the foreign country where the work is first produced, then the publisher (and not the author) is the person entitled to take proceedings in Her Majesty's dominions for protecting the copyright, without prejudice to the rights of author and publisher as between themselves (Order in Council, 1887, s. 4).

Where the work is produced simultaneously in two or more countries of the Union, it is to be deemed to have been first produced in that one of them in which the term of copyright in such work is shortest (*id.* s. 5).

Under the earlier International Copyright Acts, registration was necessary on the part of the foreign author; but this is no longer so under the last Act and the Order in Council issued in conformity with it (*Hanfstaengl v. American Tobacco Co.*, *ubi supra*, dissenting from *Fishburn v. Hollingshead*, [1891] 2 Ch. 37).

But the foreign author must comply with the conditions and formalities prescribed by law in the country of origin of the work (Convention, Art. 2).

The existence and proprietorship of foreign copyright are proveable by an extract from a foreign register or a certificate authenticated by the official seal of a minister of State of the foreign country, or by the official seal or the signature of a British diplomatic or consular officer acting in such country (49 & 50 Vict. c. 33, s. 7).

The author of a book or dramatic piece first produced in any country of the Union has the same right of preventing the production in and importation into the United Kingdom of any unauthorised translation of his work as he has of preventing the production or importation of the original work (*id.* s. 5). But this right is to cease after ten years from first production of the work, if an authorised translation of it has not in the meantime been produced (*id.*; cp. Art. 5 of the Convention).

Authorised translations are protected as original works (Convention, Art. 6).

Adaptations, arrangements, and abridgments, so made as not to confer the character of a new and original work, are infringements of copyright (Art. 10).

Authors of dramatic or dramatico-musical works are, during the existence of their exclusive right of translation, protected against the unauthorised public representation of their works (Art. 9).

But articles from newspapers or periodicals may be reproduced, in original or in translation, unless the authors or publishers have expressly forbidden it; and this prohibition is not to apply to articles of political discussion, or to the reproduction of news of the day, or current topics (Art. 7).

The Convention also contains provisions as to extracts for educational or scientific purposes (Art. 8), as to anonymous and pseudonymous works (Art. 11), the establishment of an international office (Art. 16), the accession of additional countries to the Union (Arts. 18, 19), and withdrawal from the Union (Art. 20).

The Convention is published at length in the *Gazette* of 2nd December 1887, and may also be found in the Appendices to Copinger on *Copyright* and Scrutton on *Copyright*.

Where any person has before the date of publication of the Order in Council lawfully produced any work in the United Kingdom, any rights or interests arising from or in connection with such production, which were existing and valuable at that date, are to remain unimpaired (49 & 50 Vict. c. 33, s. 6; see *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q. B. 1; *Moul v. Groenings*, [1891] 2 Q. B. 443).

An English author or proprietor of English copyright cannot obtain redress in an English Court for an infringement of his copyright committed abroad, even by a British subject (*Morocco Bound Syndicate v. Harris*, [1895] 1 Ch. 535).

[*Authorities*.—Maugham, 1828; Lowndes (History), 1840; Turner, 1851; Blaine (Artistic), 1853; Fraser, 1860; Chappel and Shoard, 1863; Phillips, 1863; Underdown, 1863; Marshall, 1863; Coryton (Dramatic), 1873; Purday, 1877; Macfie, 1879; Jerrold, 1881; Shortt (Literature and Art), 2nd ed., 1884; Cutler (Musical and Dramatic), 1890; Copinger on *Copyright*, 3rd ed., 1893; Scrutton on *Copyright*, 3rd ed., 1896; and the American works of Law, 1866; Whitman, 1871; Drone, 1879.]

Corea.—A kingdom on the east coast of Asia, formerly under the suzerainty of China, now controlled by Japan. Since 1883, Corea has been in treaty relations with Great Britain, and three ports are now open to foreign trade. The island of Port Hamilton was occupied by the British Government in 1885, and evacuated in the following year. Consular Courts are established in Corea; see Hertsalet's *Treaties*, xvii. 282–300, and xviii. 284. There is an appeal to the Supreme Court of China and Japan, and thence (subject to the provisions of the Orders in Council) to the Queen in Council. As to conditions of appeal, see PRIVY COUNCIL.

Corn.—In the average clause of a marine policy the word “corn” includes malt (*Moody v. Surridge*, 1794, 2 Esp. 633), also peas and beans (Park, *Marine Insurance*, 7th ed., vol. i. 179, 191), but it does not include rice (*Scott v. Bourdillion*, 1806, 2 Bos. & P. N. R. 213).

Setting fire to corn is made felony by the Malicious Damage Act, 1861, ss. 16, 17.

Corn Rent.—In all leases granted by the Universities of Oxford or Cambridge, or the Colleges of Winchester or Eton, a third part of the rent must, by the provisions of 18 Eliz. c. 6, be reserved in corn, *i.e.* wheat and malt, which the lessees may pay either in kind or the equivalent in money according to the rate at which the best wheat and malt are sold in the specified markets on the market days next before the rent falls due. [See 2 Black. Com. 322.]

Corn Returns.—By the Corn Returns Act, 1882, weekly returns of the purchase of British corn have to be supplied from such towns, not less than 150 and not more than 200 in number, as may be from time to time fixed by Her Majesty in Council, and the average price of each kind of corn is to be ascertained from these returns, and published in the *London Gazette*. By the Act the duty of computing and publishing these averages was imposed upon the Board of Trade, but by Order in Council of 30th July 1891, made under the authority of the Board of Agriculture Act, 1889, this duty has been transferred to the Board of Agriculture (*q.v.*).

Corn Tax Abolition Acts.—The duties payable on the importation of corn into the United Kingdom were largely reduced by 9 & 10 Vict. c. 22, and provision was made at the same time for the abolition of the duty altogether (with the exception of the nominal duty of one shilling a quarter) after 1st February 1849. By three Acts of 1847 these reduced duties were temporarily suspended; and finally by the Customs and Inland Revenue Act, 1869, the remaining nominal duty was abolished.

Corner House.—Sec. 49 of the London Building Act, 1894, prescribes that the height of buildings abutting on certain streets shall, in the general case, be regulated by the width of such streets; and the section further provides that, except in certain specified cases, the height of corner houses, which abut on more than one street, is to be regulated by the wider of such streets, so far as the houses abut on the same, and, so far as they abut on the narrower street, the same height is permissible to a distance of forty feet from the wider street. Subsecs. (iv.) and (v.) of s. 41 also contain provisions as to the height, etc., of erections at the rear of corner buildings.

Cornwall (Duchy of).—Cornwall was created a Duchy by Edward III. in favour of his son the Black Prince and his heirs, being eldest sons of the king of England. The possessions of the Duchy then consisted in part of seventeen assessional manors, six of which have since been sold, with the exception of the mines and minerals thereunder. Subject to certain local rights, the Duke of Cornwall is vested in right of the Duchy with the property in all mines and metallic minerals under the manors, sold and unsold, and by special Act of Parliament (The Cornwall Submarine Mines Act, 1858, 21 & 22 Vict. c. 109), with all mines and minerals lying under the seashore between high and low water marks, and under estuaries and tidal rivers in Cornwall, with the exception of such as are in land below high water mark, which is parcel of any manor belonging to Her Majesty in right of her Crown. And all minerals below low water mark under the

open sea adjacent to Cornwall are, as between the Queen and the Duke, vested in Her Majesty. It follows from the original creation that the Prince of Wales is in all cases Duke of Cornwall. When there is no Prince of Wales, the revenues go to the Crown.

The chief legal interest in the Duchy of Cornwall arises from the fact that from time immemorial till 1897 the miners of Cornwall exercised a special jurisdiction (see STANNARIES). The Stannaries were originally districts paying royalty on tin to the Earls of Cornwall, and the jurisdiction of their Court was recognised and confirmed by the Charters of 33 Edw. I. (1305). By these charters the working tinnerns were exempt from the jurisdiction of the Crown Courts except in regard to pleas of "land, life, and limb." They had the privilege of being sued only in the Stannary Courts, presided over by the Lord Warden or Vice-Warden, whose Court was a Court of record having full jurisdiction, both in common law and equity. There was also a Cornish Parliament, which received confirmation by charter in the reign of Henry VII., and whose chief duty appears to have been to consider and formulate the customs of the Stannaries. These Parliaments continued to meet till the end of last century, but are now obsolete. The Lord Warden has also ancient privileges, specially recognised and continued in the Militia Act, 1882 (45 & 46 Vict. c. 49, s. 49, subs. 5), in virtue of which a corps of miners may continue to be raised for the counties of Cornwall and Devon, and the Militia Acts shall apply "as if such corps were the militia of a separate county, and the Warden of the Stannaries was the lieutenant of that county."

All the special judicial privileges of Cornwall were, however, abolished, as from January 1, 1897, by the Stannaries Court Abolition Act, 1896 (59 & 60 Vict. c. 45), except for the purpose of continuing and concluding pending proceedings, and all the jurisdiction and powers of the Court are transferred to such County Courts as the Lord Chancellor may by order direct.

[*Authorities.*—For a very full account of the Cornish and Devonshire Courts, Rights, and Customs, see MacSwinney on *Mines and Minerals*, 1884, ch. xviii.]

Corody or Corrody.—Originally the right of free quarters due from a vassal to his lord on his circuit; latterly and more commonly applied to a right of sustenance, or to receive certain allotments of victual and provision for maintenance, or a commuted or substituted amount in money almost equivalent to a pension or annuity (Plummer Fortescue, notes, 337; 2 Black. Com. 40), and even to a right to plant on an ecclesiastical person an agent or dependant at free quarters (and see Murray, *Dict. Eng. Lang. s.v. CORRODY*).

It is treated by Blackstone (*l.c.*) as a species of incorporeal hereditament (in the nature of a rent charge) chargeable on a person in respect of a corporeal hereditament, but not on the hereditament itself. It was subject of an assize of novel disseisin (Bracton, *de Legg. Ang.* bk. iv. f. 180 a; 1 Britton, 280); but being incorporeal, could not be created or transferred except by deed (Finch, L. 162). Corodies could be created by any person with respect to any tenement, where the grant was not in *frank almoigne*. But they are most commonly found annexed to grants for ecclesiastical purposes, and the term is perhaps oftenest used with reference to the right once claimed by the sovereign to have a royal chaplain maintained or pensioned by a bishop, abbot, or friar, until

promoted to a benefice. Whether this claim flowed from the tenure of the temporalities of the bishop, or some reservation on the foundation and endowment *jure coronæ* of a bishopric, etc., or from mere aggression, is uncertain. It was enforceable by a writ *de corodio habendo*, which was not available for corodies possessed by subjects. Hale says it is of common right not extinguishable by prescription (see 2 Hale on *Fitz-H.*, N. B. 230-232); but since the Reformation corodies have ceased to be allowed or claimed.

Coronation Oath.—A solemn oath to govern rightly and religiously has for many centuries been taken by the sovereigns of England at their coronation. Thus William the Conqueror (1066) swore to defend the Churches of God and their rulers, and to rule justly and with royal providence all the people submitted to him; to establish and maintain rightful law, and to utterly prohibit plunder and unjust judgment. In the mediæval "*Liber Regalis*," followed at the coronation of Richard II. (1377), the king swore to the best of his power to preserve for the Church and clergy of God, and his people, unbroken peace and concord with God; to exercise in all his judgments true and upright justice and discernment, in mercy and in truth; and to maintain, protect, and strengthen for the honour of God the just laws which the people had chosen. The present form of the coronation oath, which is set out in Phillimore's *Ecc. Law*, 2nd ed., and Maskell's *Monumenta Ritualia*, is prescribed by Stat. 1 Will. & Mary, st. 1, c. 6 (1689); but alterations have been necessitated by the subsequent unions with Scotland and Ireland, including the addition of a promise to maintain the settlement of the United Church of England and Ireland. In view, however, of the disestablishment of the Irish Church in 1869, this clause will, no doubt, be omitted at future coronations. The sovereign takes the oath upon the Gospels, which he or she kisses; and also signs the oath.

[*Authorities.*—See Maskell, *Monumenta Ritualia Ecclesiæ Anglicanæ*, vol. iii.; Blackstone's *Com.* vol. i.]

Coroner.

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PART I.

HISTORICAL AND DESCRIPTIVE.

The Office of Coroner.—The status and principal functions of the modern coroner are well and briefly defined by Lord Chancellor Campbell:—"This is a very ancient and important office in the realm of England. The coroner next to the sheriff is the most important civil officer in the county, and he performs the duty of the sheriff, when the sheriff is disabled from doing so; and there are peculiar duties ascribed to him, more particularly to inquire into the manner in which persons have come to their deaths where there is any reason to suppose that may not have been by natural means; and on that inquiry, a jury being sworn, the jury have all the rights of a grand jury to find a verdict of murder, and on that finding the party accused may be tried, and may be sentenced to death" (*In re Ward*, 1861, 30 L. J. Ch. 775).

In what Countries found.—The office of coroner exists in England, Wales, and Ireland—but not in Scotland—and is found in some form or other in most of those countries, including the United States of America, whose criminal procedure has been moulded after that of England.

Coroners in the Middle Ages.—In mediæval England the coroner was a far more important official than he is now. His functions varied at different periods, but there is abundant evidence that at one time they extended to a wide range of criminal matters, and even to civil pleas. According to Bracton and Britton, writing in the second half of the thirteenth century, it would appear that coroners held inquests in cases of bodily injury, burglary, arson, rape, prison-breach, and concealment of wreck. Examination of the earliest existing coroners' rolls, beginning with the year 1265, does not indeed confirm the statements of these authorities; and Professor Gross, the most recent worker in this field, throws doubt upon their accuracy. Even the famous statute, *De Officio Coronatoris* (4 Edw. I. st. 2), so long relied on as an indisputable authority for the duties of coroners, is not above suspicion of being "apocryphal." Indeed, so closely does it follow the passage relating to coroners' duties in Bracton's treatise* (*De Legibus Angliæ*, folio 121 b), that if it is not a slightly modified reproduction of it, they must both be derived directly from some older common source (see Pollock and Maitland, *Hist. Eng. Law*, ii. 641).

There is no doubt, however, that, in addition to the coroners' principal function—the holding of inquests in cases of deaths from violence or accident and deaths in prison—they also heard "appeals," or criminal accusations brought by one person against another; kept a record of outlawries; received the confession and abjuration of felons who had fled to

sanctuary; tried criminal pleas previous to Magna Carta (1215), and even after that passed judgments on felons caught in the act, and conducted jury trials in ordinary civil pleas. They caused the chattels of persons against whom the inquest jury found a verdict of felony to be appraised and placed in charge of the township, to be forfeited to the Crown if the accused were subsequently found guilty at his trial before the justices in eyre. Besides these, they had a host of miscellaneous functions, for which the reader is referred to Professor Gross' Introduction to *Select Coroners' Rolls*.

Origin of the name Coroner.—In the earliest charters alluding to the office, its holders are styled "Custodes placitorum coronæ." In later charters this style is used interchangeably with "coronatores," thus proving conclusively the identity of the two (note p. xvi, *Select Coroners' Rolls*). The function implied by their title "is that of keeping (*custodire*) as distinguished from holding, the pleas of the Crown; they are not to hear and determine causes, but are to keep a record of all that goes on in the county and in any way concerns criminal justice, and more particularly must they guard the revenues which will come to the king, if such justice be duly done" (Pollock and Maitland, *Hist. Eng. Law*, i. 520).

Origin of the Office.—The exact date of the origin of the office has not been, and probably cannot be, ascertained. Sir John Jervis, in his well-known treatise, adopts the statement in Bacon on *Government*, that the coroner is mentioned in the reign of King Alfred. But the best modern text-books on constitutional history treat all claims to Saxon or Danish origin with scanty respect, and generally ascribe the origin of the office to the Articles of the Eyre in 1194 (Stubbs, *Select Charters*, 260; Pollock and Maitland, i. 519); while the more recent researches of Professor Gross go to show that it existed some time before that date, and that chapter 20 of the Articles of 1194 is merely a Declaratory Act, referring to an institution which was already in existence. He thinks it improbable, however, that it existed in Anglo-Saxon times, because the power of the royal judicature and the idea of Crown pleas were not yet fully developed under the Anglo-Saxon kings.

The Coroner an important part in the Eyre System.—"The coroner was in fact an important concomitant of the Eyre system; the latter needed the active co-operation of the former. Both existed primarily for the king's profit" (the coroner being expected to seek diligently for the forfeited chattels of felons, for deodands, wrecks, and treasure trove); "both were useful adjuncts of a highly centralised government. The development of coroners may thus have been contemporary with that of the itinerant justices; both offices, perhaps, were tentatively employed under Henry I., fell into abeyance under Stephen, and were firmly established under Henry II." (*Select Coroners' Rolls*, p. xix).

Appointment and Qualifications in Mediæval Times.—In the thirteenth and fourteenth centuries there were usually four coroners in every county, each assisted by a "clericus" (? deputy), who sometimes held inquests. They were elected in the County Court by the commons of the county, in pursuance of a writ *de coronatore eligendo* directed, as until quite recently, to the sheriff, before whom also they took the oath of office—"ad custodienda ea quæ pertinent ad coronam." The main qualifications, as we find them laid down in different statutes, were knighthood (see *infra*), and the possession of "land in fee sufficient in the same county whereof to answer to all manner of people" (14 Edw. III. st. 1). The qualification by knighthood seems not to have been insisted on for long, but it is curious to

note that the vague property qualification is still in force, and has even been re-enacted in the Coroners Act, 1887 (s. 12), though now apparently meaningless.

The early coroners got no fees, and although they enjoyed certain privileges, the office was evidently regarded as a burden, for many persons obtained royal grants to exempt them from acting as coroners (*Select Coroners' Rolls*, p. xxi).

Coroners of Boroughs.—By special grant from the king, many boroughs were allowed to have their own coroners, who were elected by the whole body of burgesses, subject to no special qualifications. London, however, handicapped in her municipal evolution by being the seat of government, was not allowed to have her own coroner until 1478, when by charter of Edward IV. the Lord Mayor became coroner. Previous to that date it seems the functions of coroner of London were exercised by the chamberlain and sheriffs, the king's butler ("botillarius") being both chamberlain and coroner; while the actual duties of his office were performed by his deputies, who were called "sub-coronatores" (*Select Coroners' Rolls*, p. xxiii).

Franchise Coroners.—The Crown occasionally granted to lords of manors the privilege or franchise of appointing a coroner of their own. But such a franchise is of so high a nature that no subject can claim it otherwise than by grant from the Crown (2 Hawk., P. C., c. 9, s. 11).

The Early Coroner's Jury.—In the thirteenth and fourteenth centuries the coroner's inquest jury consisted most commonly of thirty-two persons—twelve representing probably the whole hundred, together with five representatives from each of four neighbouring vills or townships. But the number of townships and representatives varied (*Select Coroners' Rolls*, p. xxx).

Decline of the Coroner's Importance.—The power of the coroner was probably at its height in the thirteenth and fourteenth centuries. But already in the third year of Edward I. we find a statute reciting that "mean persons and indiscrete now of late are commonly chosen to the office of coroner where it is requisite that persons honest, lawful, and wise should occupy such offices," and ordaining that, "through all shires sufficient men shall be chosen to be coroners of the most wise and discrete knights who best know, can, and will attend upon such offices." Seventy years later, it is only required that coroners shall be chosen from "the most mete and most lawful people that shall be found in the county" (28 Edw. III. c. 6).

Payment of Coroners.—In the reign of Henry VII. it became necessary to pay coroners for their services, which up to then had been given gratuitously as a public duty. A fee of 13s. 4d. was to be paid for each inquest on a person slain, out of the forfeited chattels of the slayer. In 1752 the coroners' fees were charged on the county rates, and in 1860 a fixed salary was substituted for fees (see *infra*, p. 416).

Gradually many of the coroner's varied functions fell into disuse. By the abolition of forfeitures in *felo de se* and other felonies (33 & 34 Vict. c. 23), and of deodands in deaths from misadventure (9 & 10 Vict. c. 62), one of the chief functions of the coroner—the securing of the forfeited chattels for the king—ceased. And to make assurance doubly sure, the 44th section of the Coroners Act, 1887, enacts that "A coroner shall not take pleas of the Crown, nor hold inquests of royal fish, nor of wreck, nor of felonies, except felonies on inquisitions of death; and he shall not inquire of the goods of such as by the inquest are found guilty of murder or manslaughter, nor cause them to be valued and delivered to the township."

Treasure Trove.—Treasure trove, alone of all the ancient dues of the Crown, the coroner is still by statute bound to secure for the king; and inquests in such cases are the only inquests, besides inquests of death, that a coroner can now hold (see *infra*, p. 435). On the other hand, inquests of death were probably never so numerous as they are at the present time, owing to the determination of the Legislature to have a full public inquiry into the circumstances of every death that is not with reasonable certainty attributable to natural causes.

Fire Inquests.—An attempt was made in the middle of the present century to assert the coroner's alleged jurisdiction in cases of fire; but the practice was declared to be illegal in *R. v. Herford* (1860, 29 L. J. Q. B. 249).

Acting for Sheriff.—But under the City of London Fire Inquests Act, 1888, such inquests may still be held by the city coroner in the Middlesex portion of the city.

Outlawry.—Of the many administrative functions of the early coroners, the only survivals are that writs are directed to him instead of to the sheriff, when the latter is incapacitated, and that the coroner alone can pronounce judgment in outlawry, except in London.

Appointment and Qualifications of Coroners in Modern Times.—Down to 1888, county coroners continued to be elected by the freeholders of the county. But by the Local Government Act of that year (s. 5), the appointment of county coroners was transferred to the county council. The old writ *de coronatore eligendo* is still issued by the Lord Chancellor, but is directed to the county council instead of to the sheriff, and the county council are thereupon to elect a fit person, not being a county alderman or a county councillor, to fill such office. Sec. 12 of the Coroners Act, 1887, not being repealed, a coroner of a county must be "a fit person, having land in fee sufficient in the same county whereof he may answer to all manner of people." What amount of land in fee is "sufficient" has never been determined. A coroner for any district of a county must reside within his district, or not more than two miles out of it (Coroners Act, 1844, s. 5).

Borough Coroners.—Under the Municipal Corporations Act, 1882 (s. 171), the councils of all boroughs having a separate Court of Quarter Sessions were to "appoint a fit person, not an alderman or councillor of the borough, to be coroner of the borough." This right was saved to them by the Coroners Act, 1887 (s. 33). But by the Local Government Act, 1888, the smaller Quarter Sessions boroughs had all their powers as to coroners transferred to the county council, while the larger boroughs (set out in the schedule thereto, and referred to as "county boroughs"), being those which had a population of 50,000 and upwards on the 1st day of June 1881, are excluded from the operation of the provisions of the Act in respect to coroners by sec. 32 (3), subject only to the provisos (4) and (5) of sec. 32. The effect is that those county boroughs which happen to have a separate Quarter Sessions continue to elect their own "borough coroner" under the Municipal Corporations Act, 1882, while the coroners of all other boroughs are "county coroners" elected by the county council or by a joint committee of the county council and the council of the borough, in pursuance of a writ *de coronatore eligendo*.

Franchise Coroners.—The expression "franchise coroner" is defined in sec. 42. It comprises in fact all coroners other than—(a) county coroners (now appointed by the county councils); (b) borough coroners (appointed by the town councils); (c) the justices of the High Court, who are coroners by virtue of their office. The jurisdiction of a

franchise coroner is confined to the particular precinct over which he is appointed, and depends upon the terms of the grant in each particular liberty.

The Crown may claim by prescription the right to appoint a franchise coroner, but no subject can claim it otherwise than by grant from the Crown. The various Acts of Parliament dealing with the mode of appointment of coroner have left this franchise untouched down to the present day. Thus the Mayor and Commonalty of London, the Cinque Ports, the Dean and Chapter of Westminster, the University of Oxford, and various other bodies, each elect their own coroner. But subject to certain savings as to mode of appointment and removal, the provisions of the Coroners Act, 1887, apply to franchise coroners (s. 30). There are no express qualifications for franchise coroners.

The two principal franchise coroners are the coroners for the Admiralty of England and the coroner for the Queen's household (see *infra*, p. 435).

Deputy Coroners.—The earliest writers on coroners make occasional mention of a "clericus," who appears to have been an assistant or scribe attached to each coroner. According to some writers, this clericus sometimes held inquests (*Select Coroners' Rolls*, p. xxvi); although Britton (i. 7) says it was unlawful for the coroner to substitute another in his place. In the absence of prescription, there seems to have been no common law power to appoint a deputy. Franchise coroners had the power sometimes by prescription, sometimes by terms of their grant. But deputies in counties first appear as a statutory creation under 6 & 7 Vict. c. 83, which recites that county coroners had no sufficient authority to appoint deputies, while coroners of boroughs and franchises had.

The law relating to deputies is now contained in the Coroners Act, 1892, 55 & 56 Vict. c. 56, which is to be construed as one with the Coroners Act, 1887.

Mode of Appointment of Deputies.—"Every coroner, whether for a county or a borough, shall appoint, by writing under his hand, a fit person, approved by the chairman or mayor, as the case may be, of the council who appoint the coroner, not being an alderman or councillor of such council, to be his deputy, and may revoke such appointment; but such revocation shall not take effect until the appointment of another deputy has been approved as aforesaid" (s. 1 (1)). Previous to this Act the appointment of a deputy of a county coroner had to be approved of by the Lord Chancellor, who generally required that the deputy should be a properly qualified legal or medical practitioner, and the deputy of a borough was by statute (Municipal Corporations Act, 1882, s. 172) required to be a barrister or solicitor.

Payment of Coroners.—Down to 1860, coroners of counties as well as of boroughs were generally paid by fees for each inquest held. The practical objections to this method of payment had long been insisted upon by coroners, and in that year fixed salaries liable to quinquennial revisions, were substituted for fees in counties, but payment by fees remained the rule in boroughs.

The Coroners Act, 1887.—The principal Act relating to coroners' law in modern times is the Coroners Act, 1887—"An Act to consolidate the law relating to coroners."

Part II. of this article is based on that statute, supplemented by the principles of the common law, and the established practice of coroners.

PART II.

LAW AND PROCEDURE.

[The sections and subsections referred to in the following pages are those of the Coroners Act, 1887 (50 & 51 Vict. c. 71), for which the abbreviation C. A., 1887, is sometimes used.]

In what cases Inquest must be held.—The circumstances under which a coroner is required by the C. A., 1887, to hold an inquest of death are the following:—

(a) There must be the dead body of a person lying within the area of his jurisdiction; and

(b) There must be reasonable cause to suspect that such person has died either a violent or an unnatural death, or a sudden death of which the cause is unknown, or has died in prison, or in such place or under such circumstances as to require an inquest in pursuance of some Act (s. 3 (1)).

In these circumstances the coroner acts on his own initiative and his own responsibility. His decision to hold an inquest cannot be challenged, but may be matter of complaint to the Lord Chancellor (*infra*, p. 431). On the other hand, if he neglects or refuses to hold an inquest which ought to be held, he can be ordered by the High Court to hold it under sec. 6 (*infra*, p. 429).

What is a Dead Body?—With regard to (a)—No inquest can be held unless this condition is satisfied. The question sometimes arises whether the imperfect remains of a dead body constitute the dead body of a person within the meaning of the Act. It is the practice of some coroners of great experience to hold inquests on almost any recognisable portion of a human body found under suspicious circumstances, and, after taking whatever evidence may be forthcoming at the first sitting, to adjourn for a reasonable period to allow of further search and inquiry. This practice might appear to be at variance with some early decisions (see 5 R. 110; 2 Hawk., P. C., c. 9, s. 23), but is generally justified by the greater efficacy of modern methods of post-mortem examination.

Still Births.—No inquest should be held under this section on the body of a still-born child, such not being in law “a person.” But often in practice the most important question to be decided by the inquest is whether the child was still born or not.

It is immaterial now whether the cause of the death arose within or without the coroner’s jurisdiction (s. 3 (1)), or, indeed, whether the actual death took place within or without, provided the dead body is within the jurisdiction. As to local jurisdiction of coroner, see *infra*, p. 430.

Reasonable Cause.—With regard to (b)—the existence of reasonable cause of suspicion—the coroner must use his discretion. A very slight suspicion of violent or unnatural death is generally considered by coroners to call for an inquest, on the ground that charges and suspicions in so serious a matter should be investigated in the fullest and most public manner, while the body is still in a condition to afford evidence as to the cause of death, and the circumstances are fresh in the minds of witnesses. •

Difficulty may arise in the application of the phrase “sudden death of which the cause is unknown.” There is no definition of “sudden death,” but a valuable light is thrown upon the meaning of “a death of which the cause is unknown” by the judgments in *In re Hull*, 1882, 9 Q. B. D. 689, which though prior to the C. A., 1887, is still applicable. There Lord Selborne says:—

Lord Selborne’s Judgment.—“I am of opinion that when a coroner

receives from the proper police authorities information of a sudden death, in order that an inquest may be held, and where there is no medical certificate of death from any natural cause, or other ground on which he can reasonably form an opinion as to the actual cause of death, it is his duty to hold an inquest; and that in such a case he cannot properly exercise any discretion to the contrary unless (by inquiry or otherwise) he has obtained such credible information as may be sufficient to satisfy a reasonable mind that death arose from illness or some other cause rendering an inquest unnecessary."

Mr. Justice Stephen's Judgment.—On the other hand, the limitations on the coroner's discretionary power to hold an inquest in any given case are indicated by Mr. Justice Stephen:—

"The coroner has no absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress and to interfere with their arrangements for a funeral. Nothing can justify such interference, except a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought, to hold an inquest" (*R. v. Price*, 1884, 12 Q. B. D. 247).

Inquests on Persons Dying in Prison.—From the earliest times it was an important part of the coroner's duties to hold inquests on all persons dying in prison (Britton, ff. 18, 32). The Coroners' Rolls for the thirteenth and fourteenth centuries supply a large number of verdicts, such as "died in prison from hunger and thirst and privation" (*e.g. Select Coroners' Rolls*, p. 80).

Where judgment of death has been executed, the inquest must be held within twenty-four hours after the execution (31 & 32 Vict. c. 24, s. 5).

Where an inquest is held on the body of a prisoner who dies within a prison, no officer of the prison, or prisoner therein, or person engaged in any sort of trade or dealing with the prison can be a juror on such inquest (s. 3 (2)).

A prison is within the exclusive jurisdiction of the coroner of the place to which the prison belongs (*R. v. Robinson*, 1887, 19 Q. B. D. 322) (see *infra*, p. 431).

In what cases the Circumstances of a Death should be reported to the Coroner.—Where the duty of informing the coroner of a death which ought to form the subject of an inquest is not thrown by statute on any particular person (as to which, see *infra*, p. 419), it is the duty at common law of the persons about the deceased to do so. It is usual to give such information to the coroner's special officer (see *infra*, p. 419), or simply to the nearest officer of police. Formerly the finder of a person feloniously slain was expected to raise the hue (*Select Coroners' Rolls*, p. xxv). And for neglecting to send for the coroner, the township might be amerced. The coroner ought to be sent for while the body is fresh; and to bury the body of one who has died a violent death without giving notice to the coroner, or to dispose of the body in any way with intent to prevent an inquest in any case where an inquest ought properly to have been held, is an indictable offence (*R. v. Clerk*, 1701, 1 Salk. 377; *R. v. Price*, 1884, 12 Q. B. D. 248).

Instructions to Registrars of Deaths to report to Coroner.—With a view to render more difficult evasion or neglect of the law, the Registrar-General requires all registrars of births and deaths in every case where the death is due directly or indirectly to violence, or is stated to have been sudden, and no certificate from a registered medical practitioner is produced, and also

wherever the cause of death is stated to be "unknown," or there are any suspicious circumstances, to report the same to the coroner before registering such death, in order that he may decide whether an inquest is necessary.

Statutory Provisions for reporting certain Deaths to the Coroner.—Under certain Acts of Parliament notice must be given to the coroner, in manner prescribed, whenever the death occurs of a person confined in certain institutions. Thus, if a lunatic dies in any asylum or licensed house, or while under the care of any person, notice must be sent to the coroner within two days of the death (see Lunacy Act, 1890, s. 84, and r. 27 of the Rules of the Commissioners in Lunacy, 1895); and, under the Inebriates Act, 1879, a statement of the cause of death of any person detained in a retreat must be sent to the coroner (42 & 43 Vict. c. 19, s. 27).

Infants Dying in Registered House.—In the case of an infant under the age of one year dying in a house registered under the Infant Life Protection Act, 1872, not only must notice of the death be given to the coroner within twenty-four hours, but the coroner must hold an inquest on the body of such infant unless a certificate under the hand of a registered medical practitioner is produced to him by the person registered, certifying that such practitioner has personally attended or examined the infant, and specifying the cause of its death, and the coroner is satisfied by the certificate that there is no ground for holding the inquest (35 & 36 Vict. c. 38, s. 8).

How the Coroner is set in Motion.—The information which sets the coroner in motion—and which need not be sworn information—comes from all kinds of sources—"registrars, medical men, friends of the deceased, strangers, neighbours, and sometimes the police" (Report of Select Committee of the House of Commons on Death Certification, 1893, p. viii). In most parishes the coroner selects one particular peace officer to whom the warrant for summoning the jury and witnesses are for convenience habitually directed. Such an officer is generally known as "the coroner's officer." It is his duty to collect all the information he can with regard to any case occurring in his parish which seems to require investigation, and to forward this information in a written report to the coroner, reporting further in person if required to do so by the coroner; and if the coroner decides to hold the inquest, his officer, besides summoning the jury and witnesses, also attends the coroner during the inquest.

But the coroner's officer is, strictly speaking, no more than the peace officer to whom the coroner happens to have sent his warrant for summoning the inquest jury; and the coroner may legally direct his warrant to any peace officer of the parish, or to all of them generally; and the warrant so directed may be executed by any constable or peace officer to whom he may see fit to deliver it for that purpose (opinion of counsel, Lush and Welsby, on case submitted by St. Pancras Vestry in 1864).

The officer's report to the coroner should supply particulars as far as possible relating to name, age, occupation of deceased; where and when deceased died or was found dead or dying; whether deceased had any medical attendance before death, and, if so, who attended, and for how long, and whether he declines to give a certificate of the cause of death; whether any known illness or injury existed before death, the nature of such illness and its duration; whether negligence or blame is alleged against any party; the supposed cause of death if known or suspected, and the circumstances relating to it, as, for instance, whether it was a sudden death, or a violent death, or attended with any suspicious circumstances.

Coroner is justified in acting upon Information honestly believed by him to

be true.—It is obviously impossible for the coroner to be certain of the accuracy of the information supplied to him or his officer, and accordingly it has been decided that a coroner is justified in holding an inquest on information honestly believed by him to be true, which, if true, would make it his duty to hold an inquest, whether, in fact, such information is true or not. A coroner acts, and ought to act, upon information, not upon conclusive evidence. His inquiry would be useless if he had previously by evidence to satisfy himself of the cause of death (*R. v. Stephenson*, 1884, 13 Q. B. D. 331).

Delay in holding Inquest.—The circumstances which require that an inquest should be held having, in the judgment of the coroner arisen, he has no option, and must hold an inquest without unreasonable delay. There is no definite time within which the inquest must be held. A delay of five days without special reason in the case of a body already in a state of decomposition has been held ground of censure by the Lord Chancellor (*In re Hull*, 1882, 9 Q. B. D. 692). The body is part of the evidence, and should be viewed by the jury while it is in a condition to give useful information (2 Hawk., P. C., c. 9, s. 23).

The Jury.—As soon as practicable the coroner is to issue his warrant for summoning not less than twelve nor more than twenty-three good and lawful men to appear before him at a specified time and place, there to inquire as jurors touching the death (s. 3 (1)).

Qualifications and Exemptions.—Aliens, convicts, outlaws, and probably women and males under twenty-one years of age, would be excluded by the description "good and lawful." By the Juries Act, 1870, aliens are qualified and liable after ten years' domicile in England or Wales, but not otherwise; while convicts (unless a free pardon has been granted) and outlaws are expressly disqualified. The qualifications and exemptions of jurors, subject to the above, are to be gathered from the County Juries Act, 1825, and the Juries Act, 1870, which are to be read together. The application of these Acts to coroners' juries was considered in *R. v. Dutton*, [1892] 1 Q. B. 486, and it was there laid down by Hawkins, J., that the rules for the selection of jurors contained in these two statutes apply to juries for the trial of issues in the superior and inferior Courts, but not to coroners' juries; whereas the persons described in the schedule to the Juries Act, 1870, are exempt from service upon all juries, coroners' juries included. It would seem, therefore, that sec. 1 of the Act of 1825, which has been relied on as establishing an age limit for service on all juries, does not apply to coroners' juries; and as previous to that Act there was no age limit for jurors of any kind, so there is none at present for coroners' juries. The effect of the proviso in sec. 52 of the Act of 1825 is that coroners are enabled to summon as jurors persons who are not qualified to be jurors on trials at Nisi Prius (per Wills, J., *R. v. Dutton*, [1892] 1 Q. B. 486).

In addition to the classes of persons exempted by the schedule of the Juries Act, 1870, there are a number of other classes exempted by various special Acts, e.g. soldiers in the regular army, registered dentists, and income-tax commissioners, have been exempted since the Act of 1870.

Excuses.—But no person whose name is on the jury book as a juror is entitled to be excused from attendance on the ground of any disqualification or exemption, other than illness, not claimed by him at or before the revision of the list by the justices of the peace (Juries Act, 1870, s. 12).

It seems that jurors should be householders from within the jurisdiction of the coroner.

Jurors on Inquest on Person dying in Prison.—No officer of a prison, or

prisoner therein, or person engaged in any sort of trade or dealing with the prison, can be a juror on an inquest held on the body of a prisoner who has died within the prison (s. 3 (2)).

Non-attendance of Juror, or refusal to serve.—Where a person has been duly summoned as a juror, failure to appear in answer to the summons, or refusal without reasonable excuse to serve on the inquest, may be punished by the coroner by a fine not exceeding £5 (s. 19 (1)), or in the alternative the coroner may deal with the offending juror under his common law powers, which are expressly saved by sec. 19 (3), and include power to issue warrant to apprehend the offender and bring him into Court, and further to commit him for contempt in not obeying the summons of the coroner.

The Inquest.—An inquest cannot be held on Sunday, which is *dies non juridicus*, in which no judicial act ought to be done, although ministerial acts, such as the issuing of warrants, may be.

Opening the Court.—The Court is opened by proclamation. If a sufficient number to form a full jury do not appear, the coroner may forthwith summon so many other good and lawful men then present or in the neighbourhood as may be sufficient to form a jury (Jervis, p. 16, 5th ed.).

Swearing the Jury.—Not less than twelve jurors being assembled, a foreman is appointed by the jurors, or, if they disagree, by the coroner; and the jurors are then sworn diligently to inquire touching the death of the person on whose body the inquest is about to be held, and a true verdict to give according to the evidence (s. 3 (3)).

Form of Oath.—It is to be noted that in the form of oath given in the schedule to the Act the jurors are sworn to give their verdict not only according to the evidence, but also “to the best of their skill and knowledge.” This is the old form of oath, a survival from the times when the functions of jurors were not fully differentiated from those of witnesses; and the express retention of these words in the statutory form suggests that a coroner’s jury are at liberty to found a verdict on their knowledge derived from any source whatever. It was said by Cockburn, C.J. (in *R. v. Ingham*, 1864, 5 B. & S. 257), that the Court would not quash an inquisition because the verdict was against the weight of evidence.

Need not be Administered super visum corporis.—Formerly the oath was administered *super visum corporis*. But this is no longer necessary, nor is it necessary that the jury should all be sworn at the same time. It is sufficient if they are all sworn first and view afterwards (*R. v. Ingham, supra*). It is irregular to swear an additional juror after view and part evidence (*R. v. Coroner of Yorkshire*, 1864, 9 Cox C.C. 373).

The jury having been sworn, it would be irregular to dismiss them without proceeding with the inquest, and if this were done without adequate reason, or from improper motive, it would be a misbehaviour within the meaning of 23 & 24 Vict. c. 116 (*In re Ward*, 1861, 30 L. J. Ch. 775).

Perjury.—The rules for the administration of oaths, the right to affirm, and the consequences of perjury are the same in the Coroner’s Court as in the ordinary Courts of justice.

Publicity of Coroner’s Inquest.—The question of the publicity of the proceedings in the Coroner’s Court was fully argued in *Garnett v. Ferrand*, 1827, 6 Barn. & Cress. 611. From Lord Tenterden’s judgment in that case, and from the authorities referred to in the argument, the following propositions seem to be established:—

1. The Coroner’s Court, like other Courts of justice, is ordinarily open to the public, and so long as there is room, all persons have a right to be present, in the absence of special reasons to the contrary.

2. For special reasons—*e.g.* in the interests of justice, decency, order, or even from a consideration of what is due to the family of the deceased—the coroner may, in the exercise of his discretion, exclude or remove from his Court the public generally, or any particular persons, during the whole or any portion of the proceedings. The coroner alone is to decide whether such a course is necessary or proper, and his decision cannot be questioned in an action.

3. The Coroner's Court is a Court of record, of which the coroner is the judge, and therefore no action will lie against him at the suit of any person excluded or removed from the Court by his order, however improper or corrupt the coroner's motive may be.

4. Any improper or corrupt exercise of this discretionary power of exclusion or removal may be ground for the interference of the Lord Chancellor, or for prosecution before the High Court under sec. 8, C. A., 1887 (see *infra*, p. 431).

Preserving Order in Court.—The coroner has the common law right of all persons who administer public duties to preserve order and to turn out persons who may be there for improper purposes. But as judge of a Court of record he has the further power, inherent in all Courts of record, of punishing for contempt committed in Court. The coroner may therefore commit to prison any person obstructing or hindering the proceedings of his Court, or may fine such person, or order his forcible removal from Court. But he has no power to deal with contempt committed out of Court (*Ex parte Pater*, 1864, 33 L. J. M. C. 142; *R. v. Lefroy*, 1873, L. R. 8 Q. B. 134).

Right of Persons interested to be represented by Counsel.—Again, there is no absolute right of parties interested in the inquiry to be represented by counsel or solicitor. It is a matter entirely within the discretion of the coroner. But the family of the deceased, and any persons whose conduct is likely to be called in question, or whose interests are likely to be affected by the finding of the jury, are usually and properly allowed to appear by counsel or solicitor, for the purpose of assisting the Court in obtaining all available evidence to put before the jury. But neither the parties interested nor their legal representatives have any right to address the jury, or even to ask questions of the witnesses except by permission of the coroner, who will allow it if he thinks it will assist the jury in their inquiry. It is usual to allow questioning of witnesses by counsel, but not to allow addressing the jury.

The View.—The coroner and jury must, at the first sitting of the inquest, view the body (s. 4 (1)), except where, under sec. 6, the inquest is ordered by the High Court. The view is generally the next step after the jury are sworn, and before any witnesses are called; but it is submitted that it is sufficient if the view is taken at any time during the first sitting, and before verdict. The body forms part of the evidence, and an inquisition taken without view of the body has always been bad at common law, and may be quashed. It is an extra-judicial proceeding and "merely void" (*R. v. Ferrand*, 1819, 3 Barn. & Ald. 260).

Possibility of deriving useful Information from the View.—The older authorities lay it down that the view must be such that the jury can derive useful information from it, and that where, from the condition of the body, such information cannot possibly be afforded to the jury, or if there be danger of infection by digging it up, the inquest ought not to be held by the coroner, but by justices of the peace, who, without viewing the body, may take the inquest by the testimony of witnesses (5 Rep. 110; 2 Hawk.,

P. C., c. 9, s. 23). But this rule, which was reasonable in former times, is now practically obsolete, because a body, which can give very little useful information to jurors casually "viewing" it, may afford most material information, positive and negative, on post-mortem examination by a medical expert; and therefore it is by the possibility of obtaining such information that the coroner is guided in deciding whether an inquest should be held.

How conducted.—It is not now necessary for the oath to be administered, or the inquest conducted, within view of the body; nor for the coroner to be present when the jury view, nor for all the jurors to view at the same time. It is sufficient if the coroner and all the jurors view the body at the first sitting (*R. v. Ingham*, 1864, 5 B. & S. 257). But the view and the rest of the inquest proceedings must be taken within the jurisdiction of the coroner holding the inquest (see s. 7).

Obstructing Coroner or Jury.—It is a misdemeanour to resist or obstruct the coroner or jury in the view or the inquiry, or to destroy or dispose of the dead body in any way, with intent to prevent an inquest being held on it, provided that the inquest is one which the coroner is justified in holding (*R. v. Price*, 1883, 12 Q. B. D. 247; *R. v. Stephenson*, 1884, 13 Q. B. D. 331). As to what inquests a coroner is justified in holding, see *supra*, p. 417.

Exhuming Body for purpose of holding an Inquest.—A body may be disinterred for the purpose of holding an inquest on it—(1) By order of the coroner where no inquest has already been held, or only an insufficient one, i.e. one that is null and void (2 *Hawk.*, P. C., c. 9, s. 23); (2) by order obtained from the Home Secretary; (3) by order of the Court under sec. 6 (*infra*, p. 429); (4) by order of the Court where an inquisition has been quashed otherwise than under sec. 6 (*R. v. White*, 1860, 3 El. & El. 137; *R. v. Carter*, 1876, 13 Cox C. C. 220; *R. v. Coulson*, 1891, 55 J. P. 262).

If time permits, perhaps the most usual as well as the safest course for the coroner to adopt, when he wishes to hold an inquest on a body already buried, is to obtain an order for exhumation from the Home Secretary, thus securing himself against possible expense and other consequences of acting on his own responsibility. But this may involve delay, and the coroner may feel it his duty to act independently, and issue a warrant for immediate exhumation by virtue of his office, addressed to the churchwardens and overseers (or as the case may be) of the parish where the body is buried. (For form of such warrant, see *Jervis*, Appendix, Form 45, 5th ed.) The coroner ought only to exercise this power within a reasonable time after the death. Fourteen days has been suggested as a reasonable time (2 *Hawk.*, P. C., c. 9, s. 25). Seven months has been held to be too long (*R. v. Clerk*, 1701, 1 Salk. 377).

No second Inquest can be held except by Order of the Court.—A coroner has no power to hold a second inquest on a body on which a valid inquest has been already held, unless the first is quashed, and a second one ordered by the Court (*R. v. White*, 1860, 3 El. & El. 137). Should he do so, the second inquisition will be quashed.

Attendance and Examination of Witnesses—Coroner's Powers in respect of.—The coroner shall examine on oath touching the death, all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts, whom he thinks it expedient to examine (s. 4 (1)).

It is the duty of all persons who have knowledge of the circumstances attending the death to appear as witnesses at the inquest. This would appear to include medical witnesses, so far as they can speak to matters of fact, apart from opinions as experts. A juror may be sworn as a witness,

and give evidence, but it is better that a witness should not be sworn on the jury. Usually the persons who are believed to be able to give material evidence are summoned to attend by the coroner's officer.

If this summons is neglected, the coroner, as judge of a Court of record, may on proof of due service of the summons, issue his warrant against the witness for contempt of the summons (Form 27, Jervis, Appendix, 5th ed.), and cause him to be apprehended and brought to the Court in custody of a constable, and may commit him for contempt if he refuses to give evidence. (Form 28, Jervis, Appendix, 5th ed.) Or in lieu of commitment the coroner may fine the witness forty shillings, under sec. 19 (2) (see *infra*, p. 424). If a witness when in Court refuses to be sworn, or when sworn refuses without lawful excuse to answer a question put to him, the coroner, as judge of a Court of record, may commit him for contempt of Court, or, under sec. 19 (2), may fine the witness forty shillings. A witness misconducting himself in Court in any way may be committed for contempt.

Execution of Coroner's Warrant.—The coroner's summons or warrant to compel attendance of a witness may be executed within the jurisdiction by any constable. A witness outside the jurisdiction can be compelled to attend by a Crown Office subpoena. But it is the practice of some coroners to serve their warrant on such witnesses by sending their own officer to serve and execute the warrant in person, on the ground that the coroner has a right, by common law, if not by statute, to summon witnesses from any part of the United Kingdom. There is no direct decision on this practice, and its legality seems to be doubted by Jervis (p. 87, 5th ed.).

Production of Documents.—A witness failing to produce any documents in his possession which are likely to be useful to the inquiry, may be compelled to do so by a Crown Office subpoena *duces tecum*—or it may be possible to deal with him for contempt.

Coroner's Statutory Powers are in addition to Common Law Powers.—The statutory power to fine a juror or witness is in addition to, not in derogation of, any power the coroner may possess independently of the statute for compelling any person to appear and give evidence before him on any inquest or other proceeding, or for punishing any person for contempt of Court in not so appearing and giving evidence, with this qualification, that a person shall not be fined by a coroner under the statute and also be punished under the power of a coroner independently of the statute (s. 19 (3)).

Procedure for levying Fines.—Where a coroner imposes a fine he must send a certificate of the amount and cause of the fine to the clerk of the peace of the place in which the person fined resides, on or before the first day of the next Quarter Sessions, and must cause a copy of this certificate to be served on the person fined by leaving it at his residence. The fine is then to be levied and treated in all respects as if it had been part of the fines imposed at the Quarter Sessions (s. 19 (4)).

Where a recognisance is forfeited at an inquest, the procedure is the same as in the case of a fine imposed (s. 19 (5)).

Attendance and Evidence of Persons in custody or under suspicion.—Where a person whose evidence is desired is in custody, application may be made, under 16 & 17 Vict. c. 30, s. 9, to the Home Secretary or to one of the judges of the High Court at chambers, who, if they see fit to do so, may order such person to be brought before the coroner to be examined as a witness.

It is usual to apply to the Home Secretary, and the order for the compulsory attendance of the prisoner will generally be made by him, if

the person in custody is not charged with an offence connected with the death of the person on whose body the inquest is to be held. If, however, the prisoner is charged with such an offence, the order for his compulsory attendance will not generally be made, but under a recent (1894) order of the Home Secretary the prisoner is to be informed by the governor of the gaol of the date of the inquest, and allowed to attend if he desires to do so.

Cautioning Suspected Persons.—Any prisoner so attending the inquest, and any witness suspected of, or likely to be charged by the inquest jury with, causing the death of the person on whom the inquest is being held, should be cautioned by the coroner that he is not bound to give evidence or make any statement, but that if he elects to do so, whatever he says will be taken down in writing, and may be used either for or against him (*Wakley v. Cooke*, 1849, 4 Ex. Rep. 511). If the witness elect to give evidence or make a statement on oath after such caution, he may be cross-examined thereon (*R. v. Gauthrop*, 1895, 59 J. P. 377). But he cannot, of course, be compelled to answer any question the answer to which might tend to expose him to a criminal charge. The coroner may require to be satisfied that there is reasonable ground to apprehend danger to the witness from his being compelled to answer (*R. v. Boyes*, 1861, 1 B. & S. 311).

Statement on Oath by Person charged.—The examination before the coroner is the only opportunity of making a statement on oath or submitting to cross-examination at present allowed by the law to a person charged with causing the death, statements made before the magistrates or at the trial not being on oath. It seems, however, that the coroner is under no legal obligation to give notice of the inquest to the gaoler.

Examination to be conducted by Coroner.—It is the duty of the coroner to examine each witness himself, and at the end of his examination he should ask the jury if they desire any further questions put. Persons interested in the inquiry, or their representatives, are then generally allowed to question the witness, subject to the coroner's discretion. But such persons cannot claim this as of right. They have no *locus standi*, and are only allowed the privilege if, in the coroner's opinion, such a course may assist the inquiry. But all persons who have any material evidence to offer, whether for or against a suspected person, should be heard as witnesses.

Adjourning the Inquest.—The coroner may adjourn the inquiry at any stage for any reasonable cause, such as to secure the attendance of a witness, or to enable a post-mortem examination to be made, or for want of time to finish the inquiry. The adjournment may be to the same or any other convenient place, and for any reasonable time, and the inquiry may be re-adjourned as often as the coroner in his discretion may see fit (2 Hawk., P. C., c. 9, s. 25). But too frequent adjournments, or adjournments to inconvenient places, are improper (Comb. 386). The time and place of holding the adjourned inquiry must be stated at the time of adjournment, and the Court must be held, or at least formally opened, on the appointed day, and re-adjourned if necessary; otherwise the proceedings drop (*R. v. Payn*, 1864, 34 L. J. Q. B. 59).

Binding over Jury and Witnesses to appear at Adjourned Inquest.—The jurors and witnesses should be bound over in their own recognisances to attend the adjourned inquest at the time and place appointed. The coroner may require sureties in addition* (see *infra*, p. 428).

General Rules of Evidence—how far applicable.—The rules of evidence are the same in Coroners' Courts as in ordinary Courts of justice, with this important qualification, that inasmuch as the coroner's inquest is an inquiry,

not a trial, and that there is no issue and no accused person, and the finding of the jury is not final, the rules of evidence cannot be applied so strictly as in an ordinary trial of an issue between parties. Mr. Justice Wills, when charging the grand jury in the case known as "the Crewe Murder Case" (*Rep. Cor. Soc.*, 1893-94), is reported to have said: "The coroner is fettered by no precise rules of evidence . . . and can oftentimes collect evidence, facts, and statements which, whether or not they are ultimately capable of being turned into evidence against the parties who are to be put upon their trial, are often very valuable as affording clues. If the coroner rejected evidence which lay before him on the supposition that he was in the position of a judge who had to try a prisoner, and that the same wide rules of exclusion of evidence which might act against an individual in the dock applied, he would throw away much of the remaining usefulness of that institution. The coroner's inquisition could not be too thoroughly understood. It amounted to nothing more than the finding of a true bill by the grand jury." -

Verdict should not be founded on Evidence inadmissible at Trial.—But in considering the criminal responsibility of any particular person, the coroner should point out to the jury what parts of the evidence are admissible against that person. And although the finding of the jury cannot be set aside on the ground that there was no evidence to support it (*R. v. Ingham*, 1864, 5 B. & S. 257), still the coroner ought to warn the jury against bringing in a verdict founded on evidence which will clearly be inadmissible at the subsequent trial.

Again, as there are no parties to the record, and no record at all until the verdict is recorded, husband and wife are competent witnesses against each other, and compellable to prove any fact not directly tending to incriminate the other. But for the reason above given a verdict ought not to be founded on such evidence unsupported.

Statements not on Oath.—All evidence, including that of peers and children, should be given on oath or affirmation (see s. 4 (1)). But statements not on oath are often made, and may be useful in affording a clue for the examination of sworn witnesses. Such statements should not be treated as evidence, and should be disregarded by the jury in arriving at a verdict. The mere reception of such statements as evidence has been held insufficient ground for quashing an inquisition (*R. v. Ingham*, 1864, 5 B. & S. 257). But if it could be shown that the jury relied on such statements in arriving at a verdict, it is probable the inquisition would be quashed (*R. v. Coroner of Staffordshire*, 1864, 10 L. T. 650).

Improper Rejection of Evidence.—On the other hand, the rejection of evidence which ought to have been admitted may be a ground for quashing an inquisition and ordering a fresh inquest to be held, if the Court can see that to do so will forward the ends of justice (*R. v. Carter*, 1876, 13 Cox C. C. 220). But before the Court will order a fresh inquiry there should be some evidence suggested which was not already given to show that the jury might have reasonably come to another conclusion (*R. v. Coulson*, 1891, 55 J. P. 261).

Depositions in Cases of Murder or Manslaughter.—It is the duty of the coroner, in a case of murder or manslaughter, to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner (s. 4 (2)). The depositions should be read over to the witness before being signed by him (*R. v. Plummer*, 1844, 1 Car. & Kir. 600). These depositions are to be delivered

to the proper officer of the Court in which the trial is to be (s. 5 (3)) (see *infra*, p. 428). Failure to comply with these provisions is punishable by such fine as to the Court seems meet (s. 9). Copies of the depositions (and of the inquisition) are to be supplied to the person charged in the inquisition if he requires them, on payment (s. 18 (5)).

The coroner is not required to take the depositions in writing except in cases of murder or manslaughter. But as it is impossible in most cases to say what the verdict will be before the inquiry is completed, the only safe course is to adopt writing in all cases.

Particulars to be set forth in the Inquisition.—After viewing the body and hearing the evidence, the jury shall give their verdict and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, and, if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of murder or manslaughter, or of being accessories before the fact to such murder (s. 4 (3)). The jury shall also inquire of and find the particulars for the time being required by the Registration Acts to be registered concerning the death (s. 4 (4)).

Summing up and Verdict.—If he thinks it necessary, the coroner sums up the evidence and explains the law applicable to the case. A coroner is not liable to an action for slander for any words spoken by him in the course of the inquest, his Court being a Court of record (see *infra*, p. 432). Questions of fact are to be determined by the jury; questions of law are decided by the coroner. The jury should deliberate upon their finding in private, and announce it publicly (see *In re Mitchelstown Inquisition*, 1888, 22 L. R. Ir. 279).

The coroner ought to direct the jury as to the verdict which, in point of law, follows from their finding as to the facts. But it seems that the coroner is bound to accept the presentment of the jury, if they persist in it, however absurd or contrary to the law it may be (Comb. 386, 8th of Will. & Mary), and in the exercise of their judicial functions the jurors are not answerable to any power in the State.

Disagreement of the Jury.—If the jury are not unanimous, the verdict of a majority consisting of not less than twelve is sufficient. This is the rule at common law, and it is implied in sec. 4 (5) and sec. 18 (1). But in case twelve, at least, of the jury do not agree on a verdict, the coroner may either exercise his common law power of detaining the jury as long as he thinks fit, and adjourning the inquest from place to place until a verdict is returned, or he may, under sec. 4 (5), adjourn the inquest to the next sessions of oyer and terminer or gaol delivery held for the county or place in which the inquest is held, where they are charged by the judge; and if, after that, twelve of them fail to agree on a verdict, they may be discharged by the judge without giving a verdict.

Adjournment to the assizes can generally be avoided by the jury finding such particulars as they are agreed upon (*e.g.* those required for registration purposes), and leaving open the questions on which they are not agreed.

Proceedings upon Inquisition charging Person with Murder or Manslaughter.—Where a coroner's inquisition charges a person with the offence of murder or manslaughter, or of being accessory before the fact to a murder (which latter offence is in this Act included in the expression "murder"), the following enactments apply:—

(1) The coroner shall issue his warrant for arresting or detaining such person (if such warrant has not previously been issued) (s. 5 (1)); and

(2) Shall bind by recognisance all such persons examined before him as know or declare anything material touching the said offence, to appear at the next Court of oyer and terminer or gaol delivery at which the trial is to be, then and there to prosecute or give evidence against the person so charged (s. 5 (1)).

(3) Where the offence is manslaughter the coroner may, if he thinks fit, accept bail by recognisance with sufficient sureties for the appearance of the person charged at the next Court of oyer and terminer or gaol delivery at which the trial is to be, and thereupon such person, if in the custody of an officer of the Coroner's Court, or under a warrant of commitment issued by such coroner, shall be discharged therefrom (s. 5 (2)). Such recognisances are to be taken, as far as circumstances permit, in one of the forms contained in the 2nd Schedule to C. A., 1887 (s. 18 (4)).

Where the jury have found a verdict of murder, the coroner has no power to bail. Only the High Court can grant relief in this case, on application for a writ of habeas corpus, and the Court will be guided by the facts and circumstances of the case as disclosed by the depositions (see Jervis, 5th ed., p. 46). Formerly the coroner had no power to bail even in manslaughter.

(4) The inquisition, depositions, and recognisances, together with a certificate under his hand that the same have been taken before him, must be delivered by the coroner to the proper officer of the Court in which the trial is to be, before or at the opening of the Court (s. 5 (3)). But see Prosecution of Offences Act, 1879, s. 5. For penalty on failure to comply with these provisions, see sec. 9, and *infra*, p. 431.

Recognisances and Sureties for Appearance of Witness.—A witness who refuses to enter into recognisance pursuant to sec. 5 (1) (*supra*) may be dealt with by the coroner for contempt.

And it seems that a coroner may order a witness to find sureties in addition to his own recognisance, if there is reasonable ground for believing that the latter may not be sufficient security for the witness's appearance at the trial, or even at an adjourned inquest; and that, if the sureties are not forthcoming, the coroner may commit the witness to gaol for safe custody. This course has recently been followed in London on two occasions by one of the coroners, without question by the Court or the law officers of the Crown or counsel for the witness (*Rep. Cor. Soc.*, 1894-95, p. 27, and 1895-96, p. 44).

Form of the Inquisition.—The inquisition must be under the hands, and in the case of murder or manslaughter also under the seals, of the jurors who concur in the verdict, and of the coroner (s. 18 (1)). It need not, except in the case of murder or manslaughter, be on parchment, and it may be partly written and partly printed, and may be in the form contained in the schedule of the C. A., 1887, or to the like effect, and the statements therein may be made in precise and ordinary language (s. 18 (2)). But if an inquisition qualifies the finding of manslaughter by a statement of the ground of the finding, and that statement shows no legal ground for it, the inquisition is bad on the face of it, and may be quashed (*R. v. Clerk of Assize of Oxford Circuit*, [1897] 1 Q. B. 370).

Murder includes *felo de se*, and the inquisition in a case of *felo de se* has been quashed for not being on parchment (*R. v. Whalley*, 1849; 7 Dow. & L. 317).

Amending Inquisition.—If in the opinion of the Court having cognisance of the case an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or man-

slaughter sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the Court may order it to be amended if of opinion that the defect is not material to the merits of the case, and that the defendant will not be prejudiced in his defence on the merits. And for this purpose the Court may postpone the trial and respite the recognisances taken before the coroner (s. 20 (1) and (2)).

The statutory power of amending for defects other than insufficiency in the designation of the person or the offence charged is limited to the Court before which the trial is to be. But the jurisdiction of the Queen's Bench Division to quash an inquisition for irregularity on the face of it is not touched by sec. 20 of the C. A., 1887, and that Court will quash an inquisition where either the person or the offence charged is insufficiently designated (*R. v. Directors of Great Western Railway*, 1888, 20 Q. B. D. 410; *R. v. Clerk of Assize of Oxford Circuit*, [1897] 1 Q. B. 370).

The finding "*Nos certe credimus esse causam mortis*" has been held bad as being expressed as matter of belief instead of certainty (*Anon.*, 1696, 12 Mod. Ca. 112).

Amending Certificate of Finding of Jury.—The coroner has no power to amend the inquisition. But under 37 & 38 Vict. c. 88, s. 36, if satisfied on oath or statutory declaration that there is an error of fact or substance in his certificate (other than an error relating to the cause of death), the coroner may certify the nature of the error and the true facts of the case, and the error in the register may thereupon be corrected.

Coroner's Certificate for Registration of Death.—After the termination of an inquest the coroner must send the registrar of deaths such certificate of the finding of the jury as is required by the Registration Acts (s. 18 (3)).

Order for Burial.—A coroner upon holding an inquest upon any body may, if he thinks fit, after view of the body, by order under his hand, authorise the body to be buried before verdict and before registry of the death, and shall deliver such order to the relative or other person to whom the same is required by the Registration Acts to be delivered; but, except upon holding an inquest, no order, warrant, or other document for the burial of a body shall be given by the coroner (s. 18 (6)).

Ordering of Coroner to hold Inquest.—(1) Where Her Majesty's High Court of Justice, or any judge thereof (s. 6 (4)), upon application made by or under the authority of the Attorney-General, is satisfied either—

(a) That a coroner refuses or neglects to hold an inquest which ought to be held; or

(b) Where an inquest has been held by a coroner, that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held,

The Court may order an inquest to be held touching the said death, and may order the coroner to pay the costs of the application, and where an inquest has been already held may quash the inquisition on that inquest (s. 6 (1)).

(2) The Court may order that such inquest shall be held either by the said coroner or by another, and the coroner ordered to hold the inquest shall for that purpose be deemed to be the said coroner.

(3) Upon any such inquest it shall not be necessary to view the body, unless the Court otherwise order.

Jurisdiction of High Court to quash Inquisition independently of sec. 6.—Application to quash an inquisition, on the face of it defective, may be made to the High Court independently of this section and without the

Attorney-General's authority. In the case of a person on his trial on such an inquisition, the application may be made to the Court before whom the trial is, and should be made before plea pleaded (*Fost. C. L.* 231). The jurisdiction of the High Court to quash such an inquisition is not touched by the above section (*R. v. Directors of Great Western Railway*, 1888, 20 Q. B. D. 410).

Grounds held sufficient for quashing Inquisition.—With regard to the quashing of inquisitions, the following points have been judicially decided. An inquest may be quashed:—

1. For want of jurisdiction in the coroner (*Foxhall v. Barnett*, 1853, 23 L. J. Q. B. 7).

2. For objections apparent on the face of the inquisition (*R. v. Directors of Great Western Railway*, 1888, 20 Q. B. D. 410; *R. v. Clerk of Assize of Oxford Circuit*, [1897] 1 Q. B. 370).

3. For misconduct of coroner or jury (*R. v. Hethersal*, 1685, 3 Mod. 80), e.g. fraudulent misdirection by coroner (*R. v. Wakefield*, 1718, 1 Stra. 69); taking some of the jury off with a view to get a particular verdict from the remainder (*R. v. Stukeley*, 1701, 12 Mod. 493).

4. Where there has been no view of the body, or the view was such that from the state of the body no information could be derived from the view (*R. v. Bond*, 1716, 1 Stra. 22).

5. Where there has been a miscarriage of justice in consequence of the exclusion of evidence which might have thrown light upon the matter (*R. v. Carter*, 1876, 13 Cox C. C. 220).

6. Where the adjourned inquest was not held on the day to which it was adjourned, and therefore the proceedings were at an end (*R. v. Payn*, 1864, 34 L. J. Q. B. 59).

Grounds held insufficient.—On the other hand, the Court has refused to quash an inquisition—

1. On account of the reception of evidence not on oath, no mischief having resulted, and the jury having found their verdict on the other evidence only (*R. v. Coroner of Staffordshire*, 1864, 10 L. T. 650; *R. v. Ingham*, 1864, 5 B. & S. 257).

2. On account of alleged misdirection of jury by coroner, on finding of jury being incomplete, or there being no evidence to warrant the finding of the jury (*R. v. Ingham*, 1864, 5 B. & S. 257).

3. On account of principal coroner being present at, but taking no part in, an inquest properly commenced by his deputy (*R. v. Perkin*, 1845, 7 Q. B. 165).

An inquisition taken by an unauthorised person is treated as a nullity, which it would be superfluous to quash (*In re Daws*, 1838, 8 Ad. & E. 936).

Melius Inquirendum.—Where the inquisition is quashed otherwise than under sec. 6, a writ of *melius inquirendum* may be issued, ordering the coroner to institute a fresh inquiry *super visum corporis* with a fresh jury (*R. v. Carter*, 1876, 45 L. J. Q. B. 711; and see Jervis, p. 55, 5th ed.).

Local Jurisdiction of Coroners.—Formerly all the coroners for a county could hold inquests indifferently for every part of the county. But under 7 & 8 Vict. c. 92, counties were divided into districts, to each of which a coroner was assigned, with the exclusive right to hold inquests in his district.

Division of Counties into Coroners' Districts.—But such coroner is for all other purposes to be considered a coroner for the whole county, and may hold inquests for any other district of the same county during the illness, incapacity, or unavoidable absence of the coroner of that district, but not

otherwise. Coroners' districts, and the rights and duties of coroners in respect of such districts, are preserved by sec. 43 of the C. A., 1887, and by sec. 5 of the Local Government Act, 1888, which alters the mode of appointment of coroners.

Deputy Coroners.—Now, however, under the Coroners Act, 1892, the deputy of a coroner "shall act as the coroner" while the office is vacant through death or otherwise, and "may act for the coroner" during his illness or absence (see *infra*, p. 436).

Franchise Coroners.—For jurisdiction of admiralty and other franchise coroners, see *infra*, p. 435.

Inquest to be held only by Coroner within whose Jurisdiction the Body is lying.—The coroner only within whose jurisdiction the body of a person upon whose death an inquest ought to be holden is lying shall hold the inquest, and where a body is found in the sea, or in any creek, river, or navigable canal within the flowing of the sea, where there is no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be held only by the coroner having jurisdiction in the place where the body is first brought to land (s. 7 (1)).

Jurisdiction in Boroughs.—The coroner of a borough has exclusive jurisdiction within the borough, except in Admiralty cases (s. 7 (2)). But a prison belonging to a county, although situated within a borough, is within the jurisdiction of the coroner for the county, and not the coroner of the borough (*R. v. Robinson*, 1887, 19 Q. B. D. 322). Boroughs which have not a separate Court of Quarter Sessions are within the jurisdiction of the coroner of the county in which the borough is situated (s. 7 (3)).

Liabilities of Coroners: Removal and Punishment of Coroner.—The Lord Chancellor may, if he thinks fit, remove any coroner from his office, for inability or misbehaviour in the discharge of his duty (s. 8 (1)). The Lord Chancellor is the sole judge of what constitutes inability or misbehaviour (for instances, see Jervis, p. 59, 5th ed.).

The method of procedure for procuring the removal of a coroner from his office is to move before the Lord Chancellor, upon affidavits, for a rule *nisi*, calling on the coroner to show cause why he should not be removed. Such a motion may be made at the instance of any person.

The question of the legality of any act or order of the coroner may be raised by an application for an order, in the nature of a mandamus, before the High Court (see Short and Mellor's *Practice of the Crown Office*, 1890, p. 32).

By sec. 8 (2) extortion, corruption, wilful neglect of duty, or misbehaviour in the discharge of it, are constituted misdemeanours, and the Court before whom a coroner is found guilty of such misdemeanour may, in addition to any other punishment, remove him from office.

These provisions are not in any manner to prejudice or affect the jurisdiction over coroners of the Lord Chancellor or the High Court existing independently of the C. A., 1887 (s. 35).

Fine on Coroner for neglect as to Inquisition, Depositions, and Recognisances, etc.—If a coroner fails to comply with the provisions of the C. A., 1887, with respect to the delivery of the inquisition, or to the taking and delivery of the depositions and recognisances in the case of murder or manslaughter, the Court may, in a summary manner, impose such fine upon the coroner as to the Court seems meet (s. 9).

Coroner not to act as Solicitor and as Coroner in same Case.—A coroner shall not by himself or his partner, directly or indirectly, act as solicitor in the prosecution or defence of a person for an offence for which such person

is charged by an inquisition taken before him as coroner, whether such person is tried on that inquisition or on any bill of indictment found by a grand jury (s. 10 (1)). If a coroner acts in contravention of this section, he shall be deemed guilty of misbehaviour in the discharge of his duty (s. 10 (2)). And the Court before whom such person is tried may impose on a coroner appearing to the Court to act in contravention of this section such fine, not exceeding £50, as to the Court seems fit (s. 10 (3)).

By virtue of sec. 35, the High Court might also treat the offence as contempt, and the Lord Chancellor might remove the offender from his office under sec. 8.

Actions against Coroner.—The Coroner's Court being a Court of record, the coroner comes under the general rule, of great antiquity, that no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions, and not exceeding the limits of his jurisdiction—as, for instance, trespass in turning a person out of Court (*Garrett v. Ferrand*, 1827, 6 Barn. & Cress. 611), or slander in summing up (*Thomas v. Churton*, 1862, B. & S. 475). But for acts done in excess of his jurisdiction a coroner is civilly liable (*Foxhall v. Barnett*, 1853, 2 El. & Bl. 928).

Medical Witnesses and Post-Mortem Examinations: Coroner may Summon Medical Witnesses and direct Performance of Post-Mortem Examination.—Where it appears to the coroner that the deceased was attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon such practitioner as a witness; but if it appears to the coroner that the deceased person was not attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon any legally qualified medical practitioner who is at the time in actual practice in or near the place where the death happened, and any such medical witness as is summoned in pursuance of this section may be asked to give evidence as to how, in his opinion, the deceased came to his death (s. 21 (1)).

The coroner may, either in his summons for the attendance of such medical witness, or at any time between the issuing of that summons and the end of the inquest, direct such medical witness to make a post-mortem examination of the body of the deceased, with or without an analysis of the contents of the stomach or intestines.

Provided that where a person states upon oath before the coroner that in his belief the death of the deceased was caused partly or entirely by the improper or negligent treatment of a medical practitioner or other person, such medical practitioner or other person shall not be allowed to perform or assist at the post-mortem examination of the deceased (s. 21 (2)).

Majority of Jury may require Coroner to Summon another Medical Witness named by them.—If a majority of the jury sitting at an inquest are of opinion that the cause of death has not been satisfactorily explained by the evidence of the medical practitioner or other witnesses brought before them, they may require the coroner in writing to summon as a witness some other legally qualified medical practitioner named by them, and, further, to direct a post-mortem examination of the deceased, with or without an analysis of the contents of the stomach or intestines, to be made by such last-mentioned practitioner, and that whether such examination has been previously made or not, and the coroner shall comply with such requisition, and in default shall be guilty of a misdemeanour (s. 21 (3)).

Coroner may Summon more than one Medical Witness if he deems it

expedient.—It has been contended by local authorities on several occasions that the coroner has no power to call more than one medical witness unless required by the jury to do so under the above subsection (3). The question was referred to the Lord Chancellor in February 1894, and also to the Home Secretary in April 1895, and in both cases the opinion was expressed that the coroner's power is not so limited (see *Rep. Cor. Soc.* for 1894–95, p. 39).

The Lord Chancellor said coroners ought to be aware that they have authority to examine such medical witnesses as they may deem it expedient to summon independently of sec. 21 (3) (see also sec. 4 (1) and sec. 26).

Fees to Medical Witnesses.—A legally qualified medical practitioner who has attended at a coroner's inquest in obedience to a summons of the coroner under this Act shall be entitled to receive such remuneration as follows, that is to say—

(a) For attending to give evidence at any inquest whereat no post-mortem examination has been made by such practitioner, one guinea; and

(b) For making a post-mortem examination of the deceased, with or without an analysis of the contents of the stomach or intestines, and for attending to give evidence thereon, two guineas:

Provided that—

(1) No fee shall be paid for a post-mortem examination performed without the previous direction of the coroner:

(2) When an inquest is held on the body of a person who has died in a county or other lunatic asylum, or in a public hospital, infirmary, or other medical institution, or in a building or place belonging thereto, or used for the reception of patients thereof, whether the same be supported by endowments or by voluntary subscriptions, the medical officer, whose duty it may have been to attend the deceased person as a medical officer of such institution as aforesaid, shall not be entitled to such fee or remuneration (s. 22).

This proviso has given rise to much difference of opinion as to the institutions to which it applies. The only decision on the question is that in *Don Bavand v. Morrison* (*Times*, March 31, 1885), in which it was held that a workhouse infirmary comes within the proviso. But the London County Council having been advised by counsel in a contrary sense, allows the payment of fees to medical officers of these institutions.

No provision is made under this section or elsewhere for extraordinary medical investigations, or for any higher fee than two guineas. When such investigations become necessary, the coroner must obtain the consent of his paymasters—which may be given too late—or run the risk of being surcharged. The Home Office, if applied to, will generally order such investigations to be undertaken by their own experts.

Penalty on Medical Practitioner for Neglecting to obey Coroner's Summons.—Where a medical practitioner fails to obey a summons of a coroner issued in pursuance of this Act, he shall, unless he shows a good and sufficient reason for not having obeyed the same, be liable on summary conviction on the prosecution of the coroner, or of any two of the jury, to a fine not exceeding £5 (s. 23).

This section gives power to any two of the jury to intervene independently of the coroner. It would seem also to extend to the case of failure to comply with the coroner's order to make a post-mortem examination, the enforcement of which does not seem to be directly provided for elsewhere, though it is submitted that it might be dealt with as a contempt of Court.

For all other purposes the powers conferred on the coroner by sec. 12 being applicable to all witnesses will generally be found most effective.

Removal of Body for Post-Mortem Examination.—By the Public Health Act, 1875, the sanitary authority is empowered to provide and maintain a proper place for the reception of dead bodies during the time required to conduct any post-mortem examination. When such a place has been provided, the coroner may order the removal of a dead body to and from it for the purpose of such examination, the cost of the removal being deemed part of the expenses of holding the inquest (s. 24).

If no mortuary has been provided it is the common law duty of the parish officers to find some place for the deposit of a body found dead pending the inquest, and it has been suggested that such a body may be left at the house of the churchwarden of the parish. Innkeepers are not bound to receive a dead body.

Coroner's Right to remove Bodies for Inquest: Counsel's Opinion.—The coroner's right to order the removal of a body from the place where it is lying to a place more convenient for the purposes of an inquest, is often questioned, by friends and others, but apparently has never been directly raised before any tribunal competent to settle it. In 1896 certain differences of opinion having arisen between the corporation of Southampton and the borough coroner with regard to the right of the latter to order the removal of bodies from private houses to the mortuary when no post-mortem examination was intended to be made, the following questions were submitted by the Coroners' Society to two eminent Queen's Counsel and the then recorder of Southampton:—

"1. Has the coroner any right, and if so what right, to remove bodies for the purposes of his inquest, independently of any right to remove to a particular place for the purposes of a post-mortem examination?"

"2. Has he the right to remove such bodies to the public mortuary?"

Counsel gave it as their opinion that—

1. The coroner has a general right to remove a body on which an inquest is to be held to a place convenient for the holding of such inquest. They considered that in many cases it would be impossible for a coroner and his jury to perform their duties without such a power, *e.g.* the duty of viewing. It must be left to the discretion of the coroner to decide in what cases the power should be exercised; the improper exercise of his power may be good ground of complaint against the coroner, but it affords no argument against its existence. Obstruction of the coroner in the execution of his office in this respect, as in others, is an indictable misdemeanour.

Counsel thought it worth pointing out that so absolute is the power of the coroner over a dead body, that he may even of his own mere authority order it to be exhumed after it has been buried.

2. Counsel were also of opinion that the coroner may remove a body to the public mortuary.

(See *Rep. Cor. Soc.* for 1895-96, p. 25.)

Fees and Disbursements payable by Coroner on holding Inquest.—The local authority may make, and from time to time alter, a schedule of fees and disbursements (other than the fees payable to medical witnesses under sec. 22) which on the holding of an inquest may lawfully be paid and made by the coroner; and immediately after the termination of the proceedings the coroner shall pay the fees of every medical witness, not exceeding the fees fixed by sec. 22, and all expenses reasonably incurred in and about the holding of the inquest, not exceeding the sums set forth in the schedule for

the time being in force under sec. 25, and such sums shall be repaid to the coroner in manner provided by the Act (s. 25 and s. 26).

Franchise Coroners.—As to franchise coroners generally, see *supra*, Pt. I., p. 415. The two principal franchise coroners are the coroner of the Admiralty of England and the coroner of the Queen's household.

The Coroner of the Admiralty.—The president of the Admiralty Division of the High Court is the coroner of the Admiralty of England (see Jervis, p. 103, 5th ed.). His exclusive jurisdiction and that of his deputies extends to matters within the duty of the coroner arising on the open sea; and he has a concurrent jurisdiction with the county coroner upon arms of the sea, and upon rivers that are arms of the sea, that flow and reflow and bear great ships, but this does not apply to deaths which happen in small vessels but to great ships only (2 Hale, P. C. 15, 16, 54). Where the jurisdiction of the county or borough coroner is concurrent with that of the Admiralty, the coroner who first obtains possession of the body may hold the inquest, and if he do so the authority of the other is determined.

The Coroner of the Queen's Household.—The coroner of the Queen's household is appointed by the Lord Steward for the time being, and has exclusive jurisdiction in respect of inquests on persons whose bodies are lying within the limits of any of the Queen's palaces or within the limits of any other house where Her Majesty is then demurrant and abiding in her own royal person, notwithstanding the subsequent removal of Her Majesty from such palace or house. The limits of such palace or house are deemed to extend to any place within the curtilage of such palace or house, but not further. The jurors on an inquest held by the coroner of the Queen's household consist of officers of the household. The inquisition, depositions, and recognisances are delivered by the coroner to the Lord Steward. Save as specially provided in sec. 29, the coroner of the Queen's household is subject to the law relating to coroners in like manner as any other franchise coroner (s. 29).

Inquest on Treasure Trove.—A coroner shall continue as heretofore to have jurisdiction to inquire of treasure that is found, who were the finders, and who suspected thereof; and the provisions of this Act shall, so far as consistent with the tenor thereof, apply to every such inquest (s. 36).

"Treasure trove is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the king, or his grantee having the franchise of treasure trove" (Chitty on *Prerogative*, p. 152).

The coroner has no jurisdiction to determine a question of title between the Crown and any other claimant (*A.-G. v. Moore*, [1893] 1 Ch. 676).

In an indictment for concealing treasure trove it is not necessary to state any inquisition before the coroner as to the title of the Queen (*R. v. Toole*, 1867, 16 W. R. 439). Nor in an indictment which charges that the prisoners did "unlawfully, wilfully, and knowingly conceal" the finding of certain treasure trove from the knowledge of the Queen, is it necessary to allege that the concealment was fraudulent (*R. v. Thomas, L. & C.* 1861-65, p. 313). For form of inquisition, see Jervis, App. Form 8, 5th ed.

Outlawry.—Outlawry, though obsolete, is not abolished. It is still the duty of the coroner to be present at the Sheriffs' Court to pronounce judgment of outlawry upon the exigent after *quinto exactus* (see Jervis,

p. 123, ed. 5). The last reported case of outlawry appears to be that of *Ex parte Stoffel*, 1867, L. R. 3 Ch. 240. In *R. v. Yandell*, 1792, 4 T. R. 521, all the steps in outlawry are fully reported.

Deputy Coroners.—The statutory law relating to deputy coroners for counties and boroughs is now wholly contained in the Coroners Act, 1892, 55 & 56 Vict. c. 56, which is to be construed as one with the Coroners Act, 1887 (for appointment and qualifications of deputy, see Pt. I., *supra*, p. 416).

Jurisdiction.—A deputy may act for the coroner during his illness, or during his absence for any lawful or reasonable cause, or at any inquest which the coroner is disqualified for holding, but not otherwise (C. A., 1892, s. 1 (3)). The question what constitutes lawful or reasonable cause is for the judge, not for the jury (*R. v. Johnson*, 1873, 12 Cox C. C. 264). Absence on holidays is reasonable cause (*ibid.*), and absence holding another inquest at commencement although coroner is afterwards present, is lawful cause (*R. v. Perkin*, 1845, 7 Q. B. 165).

In the case of a borough coroner, the necessity for the deputy's acting is to be certified on each occasion by a justice of the peace, such certificate to be openly read to every inquest jury summoned by the deputy coroner, and to be conclusive evidence of his jurisdiction to act (C. A., 1892, s. 1 (3)).

Deputy to act as Coroner during Vacancy of Office.—The deputy of a coroner shall, notwithstanding the coroner vacates his office by death or otherwise, continue in office until a new deputy is appointed, and shall act as the coroner while the office is so vacant, and one certificate may extend to the period of the vacancy, and he shall be entitled to receive in respect of the period of the vacancy the like remuneration as the vacating coroner (C. A., 1892, s. 1 (4)).

For the purpose of an inquest or act which a deputy of a coroner is authorised to hold or do, he shall be deemed to be that coroner, and have the same jurisdiction and powers, and be subject to the same obligations, liabilities, and disqualifications as that coroner, and he shall generally be subject to the provisions of the C. A., 1887, and to the law relating to coroners in like manner as that coroner. The inquisition should be described as taken before the principal and signed by the deputy in the name of the principal (*R. v. Perkin*, *supra*).

[*Authorities.*—All the principal authorities are mentioned in the text of this article.]

Corporation.—*Generally.*—A corporation is an artificial or fictitious person. Its peculiarity is that it has a legal existence distinct from that of the sum of its members. Obviously this is a refined conception not belonging to a rude age. It was, in fact, a graft from the Roman law, but once transplanted it rooted itself firmly in our common law, and such ideas as the mystical unity of the Church, the perpetuation of an office, and the use of a seal helped to familiarise men's minds with this convenient abstraction.

Kinds of Corporations.—Corporations are of two kinds—aggregate and sole. Examples of a corporation aggregate are the head and fellows of a college, the dean and chapter of a cathedral, a trading company, a municipal corporation. Examples of a corporation sole—which is a sort of corporation incarnate—are the sovereign, a bishop, a rector. This division—into aggregate and sole—rests on constitution. Another division—depending on the objects to which the corporation is dedicated—is into ecclesiastical and lay

Ecclesiastical or spiritual corporations are such as an abbot and convent, or a bishop. Lay corporations are either civil like a borough, or eleemosynary like a college or hospital.

Characteristics of a Corporation.—The distinguishing characteristics of a corporation are: (1) Unity. As an artificial person it unites and personifies (in the case of a corporation aggregate) a group of changing and transitory individuals, who, for the time being, make up the corporation. (2) Perpetual succession. In common parlance a corporation never dies. It is endowed with immortality. These two incidents of a corporation, unity—symbolised by a common seal—and perpetuity, constitute its great merit as a juristic conception. On its incorporation this artificial person has bestowed upon it a quasi-baptismal name, and in this corporate name the corporation can sue and be sued, receive and hold property, and do any act which is within its powers. What those powers are will depend upon the incorporating Act, charter, deed of settlement, or other instrument. The intention of a corporation to exercise its powers or to do any act it evidences—being an invisible body—by its common seal, but sealing is not in all cases necessary to bind it. A corporation has, as consequential to its institution, a power to make by-laws for regulating its affairs and the relations of its members, and also to alter and repeal such by-laws as occasion may require. It can elect members and officers, and in all that it does the act of the majority is deemed the act of the corporation. A bare majority is for this purpose sufficient.

Liability of a Corporation.—The older view of a corporation was, that as it had no soul and no body, it could not be excommunicated or outlawed; or commit treason or felony, or beat or be beaten, or act as an executor, but these views have in modern days been much modified. A corporation may now be sued, not only for breach of contract, but for tort—for a malicious prosecution for instance (*Henderson v. Midland Rwy. Co.*, 1871, 25 L. T. 881), or a malicious libel (*Nevill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. 156; *Ranger v. Great Western Rwy. Co.*, 1855, 5 H. L. 72), or for fraud, deceit, trespass, or assault (*Butler v. Manchester and Sheffield Rwy. Co.*, 1888, 21 Q. B. D. 207). It is answerable for the misfeasances of its servants (*Green v. London Omnibus Co.*, 1859, 7 C. B. N. S. 290); it may have the scienter imputed to it (*Stiles v. Cardiff Steam Navigation Co.*, 1864, 33 L. J. Q. B. 318), and it may be indicted.

Creation.—No corporation can, by the law of England, be created without the consent of the sovereign. In cases of corporations existing by common law or prescription, this consent is implied or presumed. In corporations created by Royal Charter, Letters Patent, or Act of Parliament it is expressly given.

Dissolution.—A corporation may be dissolved (1) by Act of Parliament; (2) by the natural death of all the members; (3) by surrender of its franchise; and (4) by forfeiture of its charter.

Visitor.—Every corporation has its visitor, whose business it is to correct abuses, and see that the corporation does not deviate from the end of its institution. The ordinary is commonly the visitor of ecclesiastical corporations, the king of civil, and, in eleemosynary corporations, the founder, his heirs or assigns.

Duty.—Corporations are now, with certain exceptions, liable to the corporation duty imposed by 48 & 49 Vict. c. 51, as an equivalent for the death duties which corporations had theretofore escaped.

[*Authorities.*—Pollock and Maitland, *Hist. Eng. Law*; Grant on *Corporations*; Blackstone. See also COMPANIES, CHARTERED; COMPANY; MUNICIPAL CORPORATIONS; RAILWAY COMPANY.]

Corporations, Foreign.—The right of foreign companies to carry on business in England seems to be unquestioned, although treaties have been concluded between this and several other countries (e.g. the Anglo-French and Anglo-Belgian treaties of 1862, and the Anglo-Spanish treaty of 1883), entitling companies formed in accordance with the laws in force in either of the two contracting States to exercise "all their rights" in the dominions of the other.

Professor Westlake remarks that "the right of foreign and colonial corporations to carry on business in England, without any authority to that effect from Parliament or Government, has now passed unquestioned for so long that it may be considered to be established; and it is a very exceptional instance of liberality" (*Private International Law*, p. 337).

The status of British companies in foreign countries with which treaties have been contracted depends upon the construction by the foreign Court of their wording. A recent decision of the French Court of Cassation (*La Construction Ltd.*) has shown that even a treaty is no protection to a British company where it appears to have been formed for the purpose of taking advantage of less stringent formalities of the English law (see *Law Quarterly Review*, April 1897, p. 115).

The essential part of the Anglo-French Convention of 1862 is as follows:—"The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights and of appearing before the tribunals, whether for the purpose of bringing an action or for defending the same throughout the dominions and possessions of the other Power, subject to the sole condition of conforming to the laws of such dominions and possessions" (Art. 1).

The Anglo-Belgian Convention is in the same terms. The Anglo-Spanish Convention contains a slight variance, granting to the companies in question the exercise of all their rights, including that "of appearing before tribunals," etc.

As to Foreign Companies, see *ante*, p. 206. See also preceding article, CORPORATION.

[*Authorities.*—Westlake, *Private International Law*, 1890; Dicey, *Conflict of Laws*, 1896; Buckley on *The Companies Acts*, 1879.]

Corporations, Municipal.—See MUNICIPAL CORPORATIONS.

Corporeal Hereditaments are tangible things which descend, as a rule, in case of their owner's death and intestacy, to his heir. These are land and all things (such as trees, houses, buildings, mines and minerals) which are considered in law as forming part of land. The classification of things, as corporeal or incorporeal, was introduced into English law by Bracton (fo. 7 b, 10 b), who borrowed from Azo (Bracton and Azo, *Selden Society*, 128–131) the distinction taken by the Roman jurists (Gai. *Com. ii. ss. 12–14*) between tangible and intangible things, the latter being especially instanced by "*ea, quæ in jure consistunt*," or things, which are purely matter of right, such as obligations. But, as also happened in the case of the classification of actions imported from Roman into English law, the division of corporeal from incorporeal things was soon supported by reasons wholly drawn from English law. Thus we find that Bracton puts his borrowed

juristic conception to practical use in his book treating of acquiring the ownership of things. And the points on which he there insists are that only corporeal things can be the object of actual possession, and that the ownership of such things is principally acquired by gift, to which delivery of possession is requisite, whilst of incorporeal things there can be no delivery of possession, and their conveyance is therefore necessarily a matter of the consent of giver and receiver (Bract. fo. 10 *b*, 11 *a*, 38 *b*, 39 *b*, 51 *b*, 52 *b*, 53 *a*). And, indeed, throughout Bracton's work we find a strong contrast made between the tangible thing (especially the land), which is in a man's possession, and the mere right either to have land, which is in another's possession, or to exercise some privilege over or in respect of land in others' possession (see Bract. fo. 3 *a*, 7 *b*, 31, 39 *a*, 52, 53, 160 *a*, 220 *b*, 221, 222, 262 *b*, 264 *b*, 434 *b*, 437 *b*; note that Bracton's *jus merum* does not mean mere right, but greater right; Pollock and Maitland, *Hist. Eng. Law*, ii. 77; but the expression "mere right" is advisedly used above as meaning pure or bare right). The contrast so pointed out by Bracton took deep root in English law. Thus in Britton, incorporeal things, amongst which are classed properties, rights, and fees, are distinguished by the fact that they do not admit of possession or delivery of possession, and are therefore transferable by consent of the parties expressed in and coupled with the delivery of a writing or deed (Britt. liv. ii. ch. ii. s. 1; ch. ix. ss. 1, 5; ch. iii. ss. 13, 14; ch. xxviii. s. 8). And in Littleton, we find "things which pass by way of grant, by deed made in the country, and without livery," contrasted with the land of which a man is seised, and which he must transfer by feoffment with livery of seisin (Litt. ss. 592-628). Here we may notice that, in the settled common law, the distinction between corporeal and incorporeal things is almost entirely confined to land and to rights, which, being rights to, over, or in relation to land, follow the same course of descent as land. The word *hereditaments* was barely in use when Littleton wrote; but the things which he contrasts are those which pass, on their owner's death, to his heir. Lord Coke first expressed the common law classification in its established form, speaking of hereditaments as being corporeal or incorporeal (Co. Litt. 6 *a*), and telling us of the division of fee or inheritance into corporeal, as lands and tenements which lie in livery, and incorporeal which lie in grant, and cannot pass by livery but by deed (Co. Litt. 9 *a*). The nature of corporeal hereditaments, as the objects of possession, is also shown by the rule that a title to them cannot be made by prescription (Plowd. 170; *Wilkinson v. Proud*, 11 Mee. & W. 33; see Litt. s. 310).

Corporeal hereditaments, then, may be otherwise described as inheritable things, which are capable of actual possession and of transfer by delivery of possession. As moveable things or chattels (*q.v.*) came to devolve on their owner's executors or administrators, corporeal hereditaments were confined to immoveable things or land. The identity of corporeal hereditaments with land, and such things as will pass under the name of land, is well shown by Sir William Blackstone. "Corporeal hereditaments," says he (*Com.* ii. 17), "consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For land, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings; for they consist, saith he, of two things: *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith." And after noticing that, on account of the per-

manent and immoveable quality of land, the law regards waters, such as pools, ponds, or rivers, as so much land covered with water, and requires them to be so described for the purpose of conveyance or recovery of possession, Sir William continues: "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum ejus est usque ad cælum* is the maxim of the law, upwards; therefore, no man may erect any building, or the like, to overhang another's land; and, downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of the earth, but everything under it or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing; but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass."

Although at common law, corporeal hereditaments lay in livery, that is, were transferable only by feoffment with livery of seisin, in modern times it was the practice to convey them by the device of a lease and release (*q.v.*), which avoided the necessity of any actual entry on the land. Corporeal hereditaments were first made directly transferable by deed only by an Act of 1841 (Stat. 4 & 5 Vict. c. 21; see also 7 & 8 Vict. c. 76, ss. 2, 13). And it is now enacted by the Real Property Act, 1845 (Stat. 8 & 9 Vict. c. 106, s. 2), that after the 1st of October 1845 all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. Corporeal hereditaments, therefore, now no longer lie in livery only, but are also transferable, like incorporeal hereditaments, by deed of grant. And since 1845 it has been the regular practice so to transfer them.

Corpse.—The common law recognises no right of ownership in a corpse, or, as it is usually phrased, "the dead body of a human being is not capable of being stolen" (Steph. *Dig. Crim. Law*, 5th ed., 252; *R. v. Haynes*, 1614, 12 Co. Rep. 113; 2 East P. C. 652; *R. v. Sharpe*, 1857, Dears. & B. C. C. 160). And in case of theft of the shroud or any property buried with the deceased, the property must not be described as that of the deceased, but may be described as that of his executors or administrators, if probate or letters of administration have been granted (2 Hale, P. C. 181); or even it would seem though they have not been granted, (Wright and Pollock, *Possession at C. L.* 128); or, failing that, as the property of the president (naming him) of the Probate, Divorce, and Admiralty Division (21 & 22 Vict. c. 95, s. 19); or of the person who owned the shroud, etc., when put in the coffin (*Haynes' case*, 1614, 12 Co. Rep. 113), or of a person unknown, but not of the churchwardens of the parish in which the offence was committed (*Anon.* 1794, 2 East, P. C. 652). The persons bound by law to bury a corpse have a special custody of it for that purpose, and their rights and duties cannot in law be overridden by any bequest by the deceased of his own corpse, or any special directions as to the mode of its disposition (*Foster v. Dodd*, 1867, 8 B. & S. 842; *Williams v. Williams*, 1882, 20 Ch. D. 659).

A corpse can neither be conveyed, attached, taken in execution, nor arrested or detained for debt, although the contrary theory is often propounded by novelists, and illegalities of this kind have been practised even in this century in England and Ireland (*Jones v. Ashburnham*, 1804, 4 East, 460). Such arrest or detention, if effected by a gaoler or officer of the law, is a misdemeanour (*R. v. Fox*, 1841, 2 Q. B. 246; *R. v. Scott*, 1842, 2 Q. B. 248, *n.*).

It is a common law misdemeanour to prevent the burial of a corpse (*R. v. Lynn*, 1788, 2 T. R. 793; 1 R. R. 607; *R. v. Vann*, 1851, 2 Den. Cr. C. 325; *R. v. Sharpe*, 1857, Dears. & B. C. C. 160), or to dispose of a corpse so as to prevent a coroner's inquest (*R. v. Stephenson*, 1884, 13 Q. B. D. 331), or to expose a naked corpse to public view (*R. v. Clark*, 1883, 15 Cox C. C. 171). And it is by statute a misdemeanour by any secret disposition of the dead body of a newly-born infant to conceal the fact of its birth (24 & 25 Vict. c. 100, s. 60). See BIRTH, CONCEALMENT OF.

Christian burial (*q.v.*) is the ordinary mode of disposing of a corpse, but cremation is not unlawful, unless it is so carried out as to amount to a nuisance at common law (*R. v. Price*, 1884, 12 Q. B. D. 247). The legal obligation to give Christian burial has been held to be incumbent on the executors,* husband, widow (*Jenkins v. Tucker*, 1788, 1 Bl. H. 90), parent, and child, and even on a householder in whose house the deceased died. And it is at common law a misdemeanour for any person legally bound to bury a corpse not to do so if he has the means (*R. v. Stewart*, 1840, 12 Ad. & E. 773, 778; *R. v. Vann*, 1851, 2 Den. Cr. C. 325).

Where the deceased or his relations are too poor to bury him, the duty devolves on the poor law authorities, whether the death takes place within or without a workhouse (Poor Law Acts, 1843, 7 & 8 Vict. c. 101, s. 31, and 1849, 12 & 13 Vict. c. 103, ss. 16, 17). Their powers and duties extend to pauper idiots (31 & 32 Vict. c. 122, s. 13), and to pauper lunatics (Lunacy Act, 1890, 53 & 54 Vict. c. 5, s. 297). See POOR LAW.

Where the body of a person who has died of infectious disease is retained in a room where persons live or sleep, or any dead body is retained in such room which is in such a state as to endanger the health of the inmates, a justice of the peace, on a certificate signed by a legally qualified medical practitioner, may order the removal of the body by, and at the cost of, the sanitary authority for the district to a public mortuary belonging to the authority, and may direct its burial within a time specified in the order (38 & 39 Vict. c. 55, s. 142; 54 & 55 Vict. c. 76, s. 89, London). More stringent provisions are contained in an adoptive section of the Public Health Act, 1890 (53 & 54 Vict. c. 34, s. 10). Obstruction to the order of a justice is punishable on summary conviction by a penalty not exceeding £5.

If the friends and relatives of the deceased do not undertake to bury within the time named, the duty of burial devolves on the relieving officer at the expense of the poor rate, but he is entitled to recover the expense of the funeral by complaint before a Court of summary jurisdiction from the person legally liable.

In the event of outbreaks of epidemics or infectious diseases, the Local Government Board are empowered to make orders for the speedy burial of persons dying therefrom. As to dissection of corpses, see 2 & 3 Will. IV. c. 75, and *R. v. Feist*, 1858, 27 L. J. M. C. 164. (See also BURIAL GROUND.)

Interference without lawful authority with a corpse after interment in consecrated ground is at once sacrilege and a violation of the rights of the person in whom the churchyard is vested. It is also a misdemeanour (*R. v. Lynn*, 1788, 2 T. R. 793; 1 R. R. 607; *R. v. Gilles*, 1820, R. & R. 366, *n.*); and it was under this common law rule only that the misdeeds of body-snatchers and resurrectionists could be punished (see *Duffin's case*, 1818, Russ. & R. 365). It is immaterial whether the purpose of removal is gain or some laudable object (*R. v. Sharp*, 1856, Dears. & B. C. C. 160). The Ecclesiastical Courts can grant faculties for the removal of interred remains, whether for sentimental or sanitary reasons (*Rector, etc., of St. Helen's, Bishopsgate v. Parishioners*, [1892] Prob. 259). But the faculty is granted only with a view to their reinterment in other consecrated ground, and not for cremation (*In re Dixon*, [1892] Prob. 386), although by faculty cremated remains can be interred in a church even when it is closed for burials (*In re Kerr*, [1894] Prob. 284). Where Orders in Council have been made under the Burial Acts for removing human remains under a church, a faculty is still also necessary, as the Acts do not affect the jurisdiction of the ordinary, but is granted as of course (*In re St. Mary at Hill*, [1892] Prob. 394; *In re St. Michael, Bassingham*, [1893] Prob. 233). A similar procedure is followed where disused churchyards are used for commercial purposes (*In re St. Nicholas, Cole Abbey*, [1893] Prob. 69). The powers of the Ecclesiastical Courts are not confined to churchyards, but by sec. 26 of the Cemeteries Clauses Act, 1847, 10 & 11 Vict. c. 65, extend also to the consecrated part of a cemetery.

Where a corpse is not interred in consecrated ground its disinterment is unlawful, without a licence from a Secretary of State, granted by the Home Secretary, whose powers, so far as relates to disinterment for inquest or inquiry into suspected crime, extend also to consecrated ground. He has, as to consecrated ground, concurrent powers with the ordinary, but they do not extend to ordering reinterment in other consecrated ground.

Persons removing a corpse from any place of burial without licence are liable, on summary conviction, to forfeit a sum not exceeding £10 (20 & 21 Vict. c. 81, s. 26). This provision does not apply where a faculty has been obtained.

The coroner was entitled at common law to direct disinterment within a reasonable time after burial for the purposes of an inquest, or of a further inquest where the first has been insufficient (*R. v. Clerk*, 1702, Lord Holt, 167; *R. v. Bond*, 1716, 1 Str. 22; Hawk., P. C., bk. ii. c. 9, s. 23; 32 L. J. *n.*).

[*Authorities*.—Steph. *Dig. Crim. Law*, 5th ed., p. 252; Archb. *Cr. Pl.*, 21st ed., 369, 1071; Russ. on *Crimes*, 6th ed., vol. i. pp. 748, 934; Little on *Burials*, 2nd ed., 1894; Phillimore, *Eccl. Law*, 2nd ed., 690.]

Corpus and Income.—The question whether a particular receipt of payment from or in respect of property which is held by or in trust for two or more owners in succession is corpus or capital on the one hand, or income or interest on the other, frequently gives rise to difficulties. The question is often merely one of construction of a will or settlement, by which the successive interests were created, but it has also often to be decided by general principles, so far as they can be gathered from the decided cases. In this article it is assumed that there is nothing in the will or settlement affecting the question at issue.

I. RECEIPTS.

The general rule is obvious: all periodic and recurring payments received, which leave the fund intact, are income.

Rents, annuities, and other periodical payments which accrued in part before the death of a testator are apportionable under the Apportionment Act, 1870 (ss. 2 and 5). See APPORTIONMENT.

(a) *Casual profits* are income, e.g. fines payable on the renewal of renewable leaseholds (*Milles v. Milles*, 1802, 6 Ves. 761); fines and heriots derived from copyholds (*Brigstocke v. Brigstocke*, 1878, 8 Ch. D. 357; *Earl Cowley v. Wollsley*, 1866, 35 Beav. 640); rents or royalties from open mines and quarries, or brickfields worked by the testator (i.e., see *Dashwood v. Magniac*, [1891] 3 Ch. 360). See also Lewin on *Trusts*, 9th ed., p. 767.

(b) *Mines and Timber*.—One-fourth or three-fourths of the rents reserved on mining leases granted under the Settled Land Act, 1882, according as the tenant for life is impeachable for waste in respect of minerals or not (s. 11), and one-fourth of the proceeds of timber ripe for cutting, and cut with the consent of the trustees of the settlement or of the Court, under the same Act (s. 35), are income. See (a).

(c) *Profits of Business: Bonus*.—Where trust funds are retained in a business, the profits earned beyond ordinary interest on the original fund and its accretions are corpus (*In re Hill*, 1881, 50 L. J. Ch. 551). It was formerly the custom to allow the interest at 4 per cent. (see last case), but in some recent cases it has been allowed at 3 per cent. only (*In re Goodenough*, [1895] 2 Ch. 537; *In re Duke of Cleveland's Estate*, [1895] 2 Ch. 542). If the funds are improperly retained, the rate allowed must not exceed that obtainable from authorised investments (see *Brown v. Gellatly*, 1867, L. R. 2 Ch. 751).

Where the testator's capital was retained in a business in which he had been a partner in order to complete certain contracts, and under a provision to that effect in the partnership agreement, the tenant for life was allowed interest at 4 per cent. on the amount of the capital at the death, from that time, the remainder of the profits earned being treated as corpus (*Fearns v. Young*, 1804, 9 Ves. 549). And in a case where the settled property was a share in a partnership undertaking, and all the profits earned were retained in the business, under the agreement, until some years after the testator's death, the whole of the profits were treated as corpus (*Straker v. Wilson*, 1870, L. R. 6 Ch. 503; *Jackson v. Jackson*, 1869, 20 L. T. 354).

Profits which were wholly earned during the life of the testator, although not paid until after his death, are corpus (*Browne v. Collins*, 1871, L. R. 12 Eq. 586); but if earned partly before and partly after his death they are treated as income without apportionment (i.e., *Ibbotson v. Elam*, 1865, L. R. 1 Eq. 188). Interest payable under partnership articles in lieu of profits earned is apportioned (*Ibbotson v. Elam*, *supra*). See generally Seton on *Decrees*, 5th ed., p. 1830.

A bonus paid in respect of the shares of a company was formerly treated as being generally corpus (*Paris v. Paris*, 1804, 10 Ves. 188), at any rate where it arose from a division of floating capital, even though originally accumulated out of profits (*Irving v. Houston*, 1803, 4 Paton Sc. App. 521; see *Bouch v. Sproule*, *infra*). In the last case cited, after reviewing a great mass of conflicting cases, the House of Lords established the rational principle that what a tenant for life is to take under an ordinary bequest of shares is what is declared as dividends, or bonuses in the shape of dividends, during the lifetime of the tenant for life (per Lindley, L.J., *In*

re Armitage, [1893] 3 Ch. at p. 346); so that if the company treat a division of accumulated profits as a dividend, and not as a capital payment, it is to be taken as income (*In re Northage*, [1891] 60 L. J. Ch. 488; *In re Malam*, [1894] 3 Ch. 578). On the other hand, if they treat it as a capital payment, e.g. by allocating it in payment of a new issue of shares (*Bouch v. Sproule*, 1887, 12 App. Cas. 385; Lewin, p. 768), it is corpus. And the fact that, having power to increase their capital, they do not purport to exercise the power on or before declaring a bonus, is material to show that the payment is made as dividend (see Lord Herschell's judgment in *Bouch v. Sproule*, *supra*).

A reserve fund accumulated from profits may accordingly be income when distributed (*In re Aylesbury*, 1890, 45 Ch. D. 237; *Lubbock v. British Bank of South Africa*, [1892] 2 Ch. 198). A surplus beyond the capital of the company received upon the sale of its undertaking may be shown to consist either wholly or in part of undrawn profits, and to be income (*In re Bridgewater Co.*, [1891] 2 Ch. 317), or if it has been treated as part of the capital, to be corpus (*In re Armitage*, [1893] 3 Ch. 337).

An allotment of shares to the old shareholders, and the profit obtained by the sale of an allotment letter, is corpus (*In re Barton*, 1868, L. R. 5 Eq. 238; *In re Bronley*, 1886, 55 L. T. 145; see *In re Malam*, [1894] 3 Ch. 578). And if an income payment by the company is used to pay for the shares in part, the value of the shares must be apportioned (*l.c.*). See further, Buckley on *Companies*, 7th ed., p. 552.

(d) *Property which ought to be Converted*.—Where the conversion ought to take place at a specified time, the whole actual income up to that time is to be treated as income, but only so much of the actual income afterwards as corresponds to such interest as would have been earned by the proceeds of the conversion. Where, therefore, there was an immediate trust for conversion and no power to postpone it, and conversion took place without undue delay, the whole actual income went to the tenant for life (*Hope v. D'Hedonville*, [1893] 2 Ch. 361). See Seton, p. 1419.

The executors or trustees of a will ought in the common case to convert personal estate within one year from the testator's death. A number of distinctions have been taken as to the share of the actual income during such year to which the tenant for life is entitled in the absence of a direction to accumulate or other indication of intention in the will (see Lewin on *Trusts*, 9th ed., p. 322; Seton, p. 1419). In *Allhusen v. Whittell* (1867, 4 L. R. Eq. 295) the tenant for life was given so much of the actual income as would have been produced by an investment in consols at the date of the death.

Where wasting securities ought to be converted under the rule in *Howe v. Lord Dartmouth* (1802, 7 Ves. 137; 2 White and Tudor, *L. C.*, 6th ed., 296, 6 R. R. 96) and *Dimes v. Scott* (1827, 4 Russ. 195; 28 R. R. 46), the actual income before conversion so far as it exceeds ordinary interest is corpus (Seton, 1417, 1420; see notes to *Howe v. Lord Dartmouth* in White and Tudor, and WASTING SECURITIES).

If a limited interest, e.g. a lease, to the actual income from which a tenant for life is entitled, be sold, the purchase-money is apportioned between corpus and income (*Jeffryes v. Conner*, 1861, 28 Beav. 328; *In re Money's Trusts*, 1862, 31 L. J. Ch. 496). If no principle exists for a fair apportionment, the trustees of a settlement ought not to assent to the sale (*Rede v. Oakes*, 1864, 32 Beav. 555; 4 De G., J. & S. 505).

(e) *Reversionary Interests*.—If a reversionary interest, to the income of which the tenant for life is entitled, is sold, the amount to be payable to

him is ascertained by finding what sum, together with compound interest at 4 per cent., would amount to the value of the interest when it is due to fall in, and deducting such sum from the price (*Chesterfield's Trusts*, 1883, 24 Ch. D. 643; *In re Godden*, 1892, W. N. 155; Seton, p. 1421).

(f) *Loss on Investments*.—If a lump sum is recovered, e.g. from a bankrupt mortgagor, which represents in part capital and in part arrears of interest, it is apportioned between income and corpus in the ratio of the amount of principal due to the amount of arrears of interest (*In re Hubbuck*, [1896] 1 Ch. 754). In the case cited a number of earlier decisions, in which different principles of apportionment were adopted, are referred to (see also Lewin, p. 1047; and *In re Foster*, 1890, 45 Ch. D. 629).

II. PAYMENTS.

Outgoings: Repairs.—The ordinary outgoings for rents, and also for repairs and such improvements as the tenant for life chooses to make, and as are not authorised by the Settled Land Acts (see SETTLED LAND ACTS) to be paid out of capital moneys, are payable out of income (Seton, p. 1480; *Caldecott v. Brown*, 1842, 2 Hare, 144; *Dunne v. Dunne*, 1855, 7 De C., M. & G. 207; *In re Leigh's Estate*, 1871, L. R. 6 Ch. 887). But money expended in finishing work begun by a testator has been allowed to be charged against corpus (*Dent v. Dent*, 1862, 30 Beav. 363), and also the cost of rebuilding a ruinous mansion-house (*Donaldson v. Donaldson*, 1876, 3 Ch. D. 743; see *Salvage*, below). See as to the position of a tenant for life in regard to repairs *In re Baring* ([1893] 1 Ch. 61).

A bequest of "income" derived from leaseholds presumably means income remaining after payment of all proper outgoings, including current repairs (*Thompson v. Redding*, [1897] 1 Ch. 876).

Payments for drainage work under the Metropolitan Management Act, 1855, are payable out of income (*In re Crawley*, 1885, 28 Ch. D. 431; but see *In re Field*, 1888, W. N. 36). So are payments made to the tenant of a farm for unexhausted improvements (*Mansel v. Norton*, 1883, 22 Ch. D. 769).

Fines on Renewal.—The expense of renewing leases is apportionable between the tenant for life and remainderman according to their interests (*In re Baring*, [1893] 1 Ch. 61; *Bradford v. Brownjohn*, 1868, L. R. 3 Ch. 711; Lewin, p. 414; Seton, p. 1493). So also are fines payable on admissions in respect of copyholds (*Carter v. Sebright*, 1859, 26 Beav. 374).

Salvage.—An outlay made for the purpose of preserving the corpus has sometimes been allowed to be raised by mortgage (see *Conway v. Fenton*, 1888, 40 Ch. D. 512), and costs incurred by the tenant for life in protecting the estate to be paid out of corpus (*In re Ormrod's Estate*, [1892] 2 Ch. 318; *Moore v. Moore*, 1889, 60 L. T. N. S. 626). The principle is not extended beyond cases of actual salvage (*In re Montagu*, [1897] 1 Ch. 685).

Charges created by the testator, although payable after his death, as, for instance, an annuity, are corpus payments, if they are debts of the testator, recoverable from his whole estate (*In re Harrison*, 1889, 43 Ch. D. 55), but not if they are, in effect, an exception from the property settled (*l.c.*, citing *Allhusen v. Whittell*, 1866, L. R. 4 Eq. 295).

Costs.—The costs of appointing new trustees are payable out of corpus (Lewin, p. 1138); so are the costs of the payment of a fund into Court by a trustee (*Whifton's Trust*, 1869, L. R. 8 Eq. 352), and generally the costs of proceedings affecting the fund itself fall upon the corpus.

The costs of a petition for payment of dividends accruing from a fund in Court fall upon the tenant for life (*Whifton's Trust*, *supra*; *Evans' Trusts*, 1872, L. R. 7 Ch. 609; Lewin, p. 1139, n.).

Correction, House of.—Houses of correction, or public work-houses, were first established in 1576 by the first Poor Law Act (18 Eliz. c. 3, ss. 5–8). Prior to that the common gaol alone could be used for imprisonment (5 Hen. iv. c. 10). Each county was required to establish two such houses. This Act lasted only for seven years (s. 13), but was continued in 1592 (35 Eliz. c. 7), and further provision was temporarily made for establishing these houses in 1598 (39 Eliz. cc. 4, 5); and in 1610 (7 Jac. i. c. 4) further provision was made to compel each county to establish and administer such houses. Their original purpose was for the imprisonment and setting to work of rogues, vagabonds, and unsettled and idle paupers, but they were extended (1610) to persons who deserted their families and the mothers of bastards. After 1708 (5 Anne, c. 16) they were utilised for the imprisonment of persons convicted of felonies having benefit of clergy; and thenceforth it was usual in statutes creating minor offences to direct imprisonment in a house of correction (see 17 Geo. ii. c. 5, s. 32). But these places were distinct from the common gaol of the county until 1835 (5 & 6 Will. iv. c. 38, ss. 3, 4), when committals to houses of correction instead of to the common gaol were legalised in certain cases. Under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42, s. 25), committal to a house of correction to await trial was legalised in the case of all indictable offences.

The distinction between gaols and houses of correction was abolished in 1866 (28 & 29 Vict. c. 126, ss. 4, 56), and with the transfer to the Crown of all prisons vested in local authorities the history of this particular place of imprisonment ends, and references to the common gaol or house of correction in statutes are now to be read as references to the prisons appointed for a particular area by the Secretary of State (see Statutory Rules and Orders, Revised, vol. v. p. 648). See GAOL; PRISON.

Corrector of the Staple.—An officer belonging to the staple, appointed under an old statute to record the transactions made between merchants.

Correspondence, Contract by, Offer and Acceptance by Letter.—An offer made by post, or made under such circumstances that the parties must have contemplated an acceptance by post (*Henthorn v. Fraser*, [1892] 2 Ch. 27), remains open until notice to withdraw it reaches the offeree, or until a reasonable time, or the time specified in the offer, for accepting it has elapsed (*Adams v. Lindsell*, 1818, 1 Barn. & Ald. 681; 19 R. R. 415; *Cooke v. Oxley*, 1790, 3 T. R. 653; 1 R. R. 783; *Stevenson v. McLean*, 1880, 5 Q. B. D. 346; *Dickinson v. Dodds*, 1876, 2 Ch. D. 463—see Anson on *Contracts*, 8th ed., p. 34, and Pollock, 5th ed., p. 29, as to this case—*Household Fire Co. v. Grant*, 1879, 4 Ex. D. 216; *Ramsgate Hotel Co. v. Montiflore*, 1866, L. R. 1 Ex. 109). It cannot be accepted when once refused, unless renewed (*Sheffield Canal Co. v. Sheffield Rwy. Co.*, 3 Rail. Cas. 132; *Hyde v. Wrench*, 1840, 3 Beav. 334), and a counter offer is an implied refusal (*l.c.*). A letter of acceptance is effective so soon as it is posted (*Household Fire Co. v. Grant*, *supra*; *Brogden v. Metrop. Rwy. Co.*, 1877, 2 App. Cas. 666), unless notice retracting it reaches the offerer before or along with the acceptance (*Dunmore v. Alexander*, 1830, 9 Shaw & Dunlop, 190; *Newcombe v. De Roos*, 1860, 29 L. J. Q. B. at p. 5; Leake on *Contracts*, 3rd ed., p. 30). So that a letter withdrawing an offer by letter, posted before, but

received after acceptance without knowledge of the withdrawal, is ineffective (*Byrne v. Van Tienhoven*, 1880, 5 C. P. D. 344), even though the post-office delivery of it is delayed (*Dunlop v. Higgins*, 1848, 1 H. L. 381; and *Hebb's case*, 1867, L. R. 4 Eq. 9) or altogether omitted (*Household Fire Co. v. Grant, supra*). There is no acceptance by neglect to reply to a letter saying that in the event of no reply, the offer will be treated as accepted (*Felthouse v. Bindley*, 1862, 11 C. B. N. S. 869).

The whole correspondence must be looked at in order to ascertain whether there is a binding agreement,—that is to say, whether an offer has been accepted without qualification,—and letters subsequent to an apparently unqualified acceptance may show that it was not intended or understood to be such (*Hussey v. Horne-Payne*, 1879, 4 App. Cas. 311; see *Bristol Aerated Bread Co. v. Maggs*, 1890, 44 Ch. D. 616; *Simpson v. Hughes*, [1896] 66 L. J. Ch. 143; and Fry on *Specific Performance*, 3rd ed., p. 257). If such an acceptance is found the contract made by it will not be affected by the fact that the parties continued to negotiate (*Bellamy v. Debenham*, 1890, 45 Ch. D. 481; see further *Maconchy v. Trower*, 1894, 2 Ir. R. 663).

The introduction of a provision, in the reply to an offer for the sale of land, that the title shall be approved by the purchaser's solicitor, does not prevent the acceptance being sufficient if it only means that the vendor is to show a proper title, for that the law implies. In *Hussey v. Horne-Payne (supra)*, Cairns, L.C., expressed an opinion that the provision has presumably this meaning, and does not mean that the solicitor is to be arbiter as to what title shall be accepted (4 App. Cas. at p. 322). This opinion was adopted in *Hudson v. Buck*, 1872, 7 Ch. D. 683; *cp. Chipperfield v. Carter*, 1895, 72 L. T. 487, where a lease to be granted was to be approved by the lessee's solicitor. A contrary view is suggested by *Honeyman v. Marryat*, 1855, 21 Beav. 14; 6 H. L. 112 (see also *Winn v. Bull, infra*; and Fry, p. 238, *n.*).

References showing that the parties contemplated a formal agreement being drawn up do not prevent a concluded agreement effected by the correspondence from being binding (*Rossiter v. Miller*, 1878, 3 App. Cas. 1124, "I have requested the solicitors to forward the agreement for purchase"), if all the terms, or a form of contract, are agreed upon (*Filly v. Hounsell*, [1896] 2 Ch. 737). But it may be shown by the correspondence (*Crossley v. Maycock*, 1874, L. R. 18 Eq. 180; *Winn v. Bull*, 1877, 7 Ch. D. 29, "this agreement is made subject to the preparation and approval of a formal document"; *Lloyd v. Nowell*, [1895] 2 Ch. 744; *Page v. Norfolk*, 1894, 70 L. T. 781), or by parol evidence (*Pym v. Campbell*, 1856, 6 El. & Bl. 370), that the preparation of the formal document was a condition precedent to liability.

For purposes of jurisdiction, a contract by correspondence is made at the place whence the acceptance is despatched (*Cowan v. O'Connor*, 1888, 20 Q. B. D. 640).

See further, CONTRACT; FRAUDS, STATUTE OF.

[*Authorities.*—See the section on "Contract" (Consent) in Campbell's *Ruling Cases*; an article in the *Law Quarterly Review*, ix. p. 316, and a note, *ibid.* viii. p. 185.]

Corroboration.—Though, for obvious reasons, it is generally expedient to be provided with corroborative evidence of all disputed facts, the evidence of a single witness is sufficient in law to prove any fact in any case, civil or criminal, except as follows:—

1. In prosecutions for *high treason* there must be two witnesses to

prove the treason, both of them to the same overt act, or one of them to one and another to another overt act of the same treason, unless the defendant willingly confess the same (7 & 8 Will. III. c. 3, ss. 2 and 4), and except in the cases named in 39 & 40 Geo. III. c. 93, and 5 & 6 Vict. c. 51, s. 1 (see *R. v. McCafferty*, 1867, 10 Cox C. C. 603).

2. In prosecutions for *perjury* there must be two witnesses. One alone is not sufficient, because there is in that case only one oath against another (*R. v. Muscot*, 1714, 10 Mod. Ca. 192, 194; and see *Archb. Crim. Law*, 21st ed., p. 338).

Although every assignment of perjury must be proved by two witnesses, it is not necessary that every fact which goes to make the assignment should be (*R. v. Gardiner*, 1839, 8 Car. & P. 737). It is enough if there be one witness and something more; some independent and corroborative testimony such as may be furnished by an admission, a confession, or a document (*R. v. Hook*, 1858, Dears. & B. C. C. 606; *R. v. Shaw*, 1865, L. & C. 579; *R. v. Braithwaite*, 1859, 1 F. & F. 638; *R. v. Parker*, 1842, Car. & M. 639).

3. In *affiliation* proceedings, no order for maintenance is to be made on the putative father by justices in petty session, or by a Court of Quarter Sessions on appeal, unless the evidence of the mother is corroborated in some material particular by other testimony to the satisfaction of the justices in petty or quarter sessions, as the case may be (35 & 36 Vict. c. 65, s. 4; 8 & 9 Vict. c. 10, s. 6). Evidence of acts of familiarity between the mother and the defendant at a time before the child could have been begotten, is sufficient (*Cole v. Manning*, 1877, 2 Q. B. D. 611; 46 L. J. M. C. 175).

4. In prosecutions under secs. 2 and 3 of the Criminal Law Amendment Act, 1885, for procuring women or girls for the purposes of prostitution, or procuring the defilement of women or girls, no person shall be convicted upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused; and in prosecutions under sec. 4 of the same Act, for carnally knowing, or attempting to carnally know, a girl under the age of thirteen, if the evidence of a child of tender years is given for the prosecution, not upon oath, it must be corroborated by some other material evidence in support thereof implicating the accused (48 & 49 Vict. c. 69, ss. 2, 3, and 4).

5. In *actions for breach of promise of marriage*, the plaintiff cannot recover a verdict upon his or her own testimony, unless it is corroborated by some other material evidence in support of the promise (32 & 33 Vict. c. 68, s. 2; *Bessela v. Sterne*, 1877, 2 C. P. D. 265; 46 L. J. C. P. 467; *Wiedeman v. Walpole*, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762).

6. An order for removal of a pauper under 39 & 40 Vict. c. 61, s. 34, cannot be made upon the uncorroborated evidence of the person to be removed.

7. A person cannot be convicted of an offence under the Prevention of Cruelty to Children Act, 1894, upon the testimony of a child of tender years given not upon oath, unless it is corroborated by some other material evidence implicating the accused (57 & 58 Vict. c. 41, s. 15).

In the following cases corroborative evidence is usually required in practice, though not absolutely necessary in law:—

1. In criminal prosecutions the jury ought not to convict on the unsupported evidence of an accomplice. The judge should not withdraw the case from the jury, but should advise them to acquit, unless such evidence be corroborated, not only as to the circumstances of the offence, but as to the participation in it by the accused (*R. v. Stubbs*, 1855, Dears. & P. 555; *R. v. Wilkes*, 1836, 7 Car. & P. 272; *In re Meunier*, [1894] 2 Q. B. 415).

2. In divorce proceedings, the Court will not act upon the uncorro-

borated evidence of a party (Brown and Powles on *Divorce*, 5th ed., p. 397; Wills on *Evidence*, p. 242).

The uncorroborated admissions or confessions of a wife, respondent in a divorce suit, should be received with the utmost circumspection and caution, but, if genuine, may be acted upon (*Robinson v. Robinson*, 1859, 1 Sw. & Tr. 362, 393).

3. There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; but such testimony will be regarded with jealous suspicion, and the Court will in general require corroboration (*Gandy v. Macaulay*, 1885, 31 Ch. D. 1; *Beckett v. Ramsdale*, 1885, 31 Ch. D. 177; 55 L. J. Ch. 241; 34 W. R. 127).

Corrosives.—It is felony to cast or throw at or otherwise apply to any person any corrosive fluid, with intent to burn, maim, disfigure, or disable, or do grievous bodily harm to any person, whether any bodily injury be effected or not (24 & 25 Vict. c. 100, s. 29). The punishment is penal servitude for life or not less than three years, or imprisonment with or without hard labour for not over two years. Males under sixteen may also be whipped.

The special words are directed against vitriol-throwing. See BODILY HARM; MAYHEM.

Corrupt Practices.

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III. CORRUPT PRACTICES BY PUBLIC BODIES.

I. CORRUPT PRACTICES AT PARLIAMENTARY ELECTIONS.

MEANING OF CORRUPT PRACTICES.—Corrupt practices are defined by the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, s. 3, as meaning bribery, treating, and undue influence, or any such offences, as defined by Act of Parliament or recognised by the common law of Parliament.

The Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47. Vict. c. 51, has amended and effected considerable changes in the law relating to the prevention of corrupt and illegal practices at Parliamentary Elections. The expression "corrupt practice," as used in that Act, means (see s. 3), any one of the following offences: (1) bribery; (2) treating; (3) undue influence; (4) personation, and aiding, abetting, counselling, and procuring the commission of the offence of personation; and (5) knowingly making a false declaration as to election expenses (see s. 33). Every offence which is a corrupt practice within the meaning of that Act is, under sec. 3, to be a corrupt practice within the meaning of the Parliamentary Elections Act, 1868.

Corrupt intention is of the essence of a corrupt practice; a corrupt practice, it has been said, is a thing the mind goes along with; illegal practices, on the other hand, may be committed whatever the intention may be; an act forbidden by the Legislature is an illegal practice, whether it be done honestly or dishonestly (see *Barrow-in-Furness*, 1886, 4 O'M. & H. 77; see also *Walsall*, 1892, *ibid.* 127). Political or other associations cannot be guilty of corrupt practices, an association, as such, being incapable of corrupt intention; the members, however, may be. As to corrupt practices by members of political and other associations, see *Taunton*, 1869, 1 O'M. & H. 181; *Blackburn*, 1869, *ibid.* 200; *Wakefield*, 1874, 2 O'M. & H. 102; *Bewdley*, 1880, 3 O'M. & H. 146; *Wigan*, 1881, 4 O'M. & H. 7; *Walsall*, 1892, *ibid.* 123; *Hexham*, 1892, *ibid.* 145; *Worcester*, 1892, *ibid.* 153; *Rochester*, 1892, *ibid.* 158; *Lancaster*, 1896, 5 O'M. & H. 43; *Tower Hamlets*, 1896, *ibid.* 97. As to how far drunkenness might rebut the imputation of a corrupt intention, see *Montgomery*, 1892, Day's El. Cas. 64, 151. An act which at the time it was done was legal cannot become corrupt by the subsequent conduct of the party who did it (see per Pollock, B., *Lichfield*, 1895, 5 O'M. & H. 28).

Corrupt practices may be committed before, during, or after an election, and whenever committed will avoid the election (see *Sligo*, 1869, 1 O'M. & H. 302; *Youghal*, 1869, *ibid.* 291; *Stroud*, 1874, 2 O'M. & H. 183; *Norwich*, 1886, 4 O'M. & H. 86; *Hexham*, 1892, 4 O'M. & H. 143). But the period during which a candidate can be held responsible for the acts of his agents must be confined within reasonable limits (see per Hawkins, J., *Walsall*, 1892, 4 O'M. & H. 125; see also *Lichfield*, 1895, 5 O'M. & H. 36; *Elgin*, 1895, *ibid.* 12; *Lancaster*, 1896, *ibid.* 125; and AGENCY (ELECTION)).

EFFECT OF CORRUPT PRACTICES.—*At Common Law.*—The prevalence of general corruption at an election, quite apart from the acts of the members or their agents, would have the effect of vitiating the election at common law (see *Guildford*, 1869, 1 O'M. & H. 15). Thus an election may be avoided at common law, on the ground of general bribery, general treating,

or general intimidation (see *Bradford*, 1869, 1 O'M. & H. 40; *Tamworth*, 1869, *ibid.* 58; *Stalybridge*, 1869, *ibid.* 72; *Beverley*, 1869, *ibid.* 147; *Stafford*, 1869, *ibid.* 229; *Nottingham*, 1869, *ibid.* 246; *Drogheda*, 1869, *ibid.* 257; *Sligo*, 1869, *ibid.* 300; *Galway*, 1874, 2 O'M. & H. 200; *St. Ives*, 1875, 3 O'M. & H. 13). As to general bribery, general treating, and general intimidation, see *post* under the heads *Bribery*, *Treating*, *Undue Influence*.

An election might also be set aside at common law on the ground of fraud, where a candidate had been guilty of bribery, treating, or undue influence, or where there has been personation at his or his agent's instigation (see *Coventry*, 1869, 1 O'M. & H. 105).

Statutory Penalties.—Under the Corrupt and Illegal Practices Prevention Act, 1883, where, upon the trial of an election petition respecting an election for a county or borough, the Election Court report that any corrupt practices other than treating or undue influence have been proved to have been committed in reference to such an election by or with the knowledge and consent of any candidate at such election, or that the offence of treating or undue influence has been proved to have been committed in reference to such election by any candidate at such election, such candidate is not capable of ever being elected to or sitting in the House of Commons for the said county or borough, and if he has been elected, his election is void, and he is in addition subject to the same incapacities as if at the date of the report he had been convicted on an indictment of a corrupt practice (s. 4). If the Election Court report that any candidate has been guilty by his agents of any corrupt practice in reference to the election, that candidate is incapable of being elected to or sitting in the House of Commons for such county or borough for seven years after the date of the report; and if he has been elected, his election is void (*ibid.* s. 5).

Every corrupt practice, other than personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation, is a misdemeanour, and renders the person committing it liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine not exceeding two hundred pounds (*ibid.* s. 6 (1)). The offence of personation, or of aiding, abetting, counselling, or procuring the commission of personation, is a felony, punishable by imprisonment for a term not exceeding two years, together with hard labour (*ibid.* s. 6 (2)).

Incapacities.—In addition to the above punishments, a person who is convicted on indictment of any corrupt practice is incapacitated during a period of seven years from the date of his conviction for being registered as an elector, or voting at any election in the United Kingdom, whether it be a parliamentary election or an election for any "public office" as defined by sec. 64 of the Act (*ibid.* s. 6 (1) (a)), or for holding any public or judicial office as defined by sec. 64; and if he holds any such office, the office is vacated (*ibid.* s. 6 (1) (b)). Any person so convicted of a corrupt practice in reference to any election is also incapable of being elected to and of sitting in the House of Commons during the seven years next after the date of his conviction; and if at that date he has been elected to the House of Commons, his election is vacated from the time of the conviction.

Moreover, every person guilty of a corrupt practice at an election is prohibited from voting at such election, and if such person votes, his vote is void (*ibid.* s. 36); and every person who, in consequence of conviction, or of the report of any Election Court or Election Commissioners, for any corrupt practice, is incapable of voting at any election, is prohibited from

voting, and his vote is void (*ibid.* s. 37). See further as to the report by an Election Court or Election Commissioners of persons guilty of corrupt practices, *ibid.* s. 38; and as to corrupt practices by justices of the peace, barristers, solicitors, and members of other professions, and by persons holding licences, see *ibid.* s. 38 (6)–(9).

Petition.—The existence of any corrupt practice affords ground for the presentation of a petition (see ELECTION PETITION).

Relief.—As to relief from the consequences of corrupt practices where a candidate has upon the trial of an election petition been reported by the Election Court guilty by his agents of treating or undue influence, see RELIEF.

PROSECUTION FOR CORRUPT PRACTICES.—Where information is given to the Director of Public Prosecutions that any corrupt practices have prevailed in reference to any election, it is his duty to make such inquiries and institute such prosecutions as the circumstances of the case appear to him to require (Corrupt and Illegal Practices Prevention Act, 1883, s. 45). It is also the duty of the Director of Public Prosecutions on the trial of every election petition to attend personally or by representative, and to obey any directions given by the Election Court with respect to the prosecution of offenders (*ibid.* s. 43 (1)); and, without any direction from the Election Court, if it appears to him that any person who has not received a certificate of indemnity has been guilty of a corrupt practice, he must prosecute such person before the Election Court, or, if he thinks expedient in the interests of justice, before any other Court (*ibid.* s. 43 (3), and s. 57 (1); see also *Ipswich*, 1886, 4 O'M. & H. 75; *West Belfast*, 1886, *ibid.* 109; *Walsall*, 1892, *ibid.* 123). Where a person is prosecuted before an Election Court for any corrupt practice, and appears before the Court, the Court is to proceed to try him summarily; and, if convicted, he is subject to the same incapacities as upon conviction on indictment, and may also be sentenced to imprisonment with or without hard labour for six months, or to pay a fine not exceeding two hundred pounds. But before proceeding to try any person summarily for any corrupt practice, the Election Court must give him the option of being tried by a jury (*ibid.* s. 43 (4)). Where the person prosecuted before the Election Court either elects to be tried by a jury, or does not appear, or if the Court thinks it expedient, it may, if of opinion that the evidence is sufficient, order him to be prosecuted on indictment or before a Court of summary jurisdiction (*ibid.* s. 43 (5) and (6)).

An Election Court, when reporting that certain persons have been guilty of any corrupt practice, must report whether those persons have or have not been furnished with certificates of indemnity; such report is to be laid before the Attorney-General with a view to his instituting or directing a prosecution against such persons as have not received certificates of indemnity, if he deems the evidence sufficient to support a prosecution (*ibid.* s. 60). As to certificates of indemnity, see *ibid.* s. 59.

A prosecution for a corrupt practice must be commenced within one year after the offence was committed, or if it was committed in reference to an election with respect to which an inquiry is held by Election Commissioners, within one year of the commission of the offence, or within three months after the report of such commissioners, whichever period last expires; but in any case, within two years after the offence was committed (*ibid.* s. 51).

See generally as to legal proceedings in respect of corrupt practices, *ibid.* ss. 50–58. As to the form of the indictment, see *R. v. Norton*, 1886, 16 Cox C. C. 59; *R. v. Stroulger*, 1886, *ibid.* 85; *R. v. Riley*, 1890, 17 Cox

C. C. 120. As to prosecutions for personation by the returning officer, see *post* under the head *Personation*.

If on the trial of an election petition a candidate is proved to have personally engaged any person as a canvasser or agent for the management of the election, knowing that he has within seven years previously been convicted or reported guilty of any corrupt practice, the election of such candidate is void (Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, s. 44).

(1) BRIBERY.

AT COMMON LAW.—Bribery at parliamentary elections was at common law a crime punishable by indictment or information (see *R. v. Pitt*, 1762, 3 Burr. 1338; see also BRIBERY), yet prosecutions for this offence appear to have been unknown until it was placed upon a legislative basis by the Statute 2 Geo. II. c. 24. The House of Commons, however, in exercise of its peculiar and exclusive jurisdiction in matters relating to the constitution of its own body, took cognisance of bribery at elections (see 4 Inst. 23; *Longe's case*, 1571, 1 Com. Journ. 88; 2 Dougl. 400; *Stockbridge*, 1689, 10 Com. Journ. 286; *Blechingley*, 1623, Glanv. 39).

The resolution of the House of Commons in 1677, which was made a Standing Order in 1678, was an early attempt to stop corrupt practices at elections by limiting the expense incurred; it prohibited the giving of money or entertainment, and any infringement of its provisions was termed bribery (see 9 Com. Journ. 411; *ibid.* 517; 2 Dougl. 403; *Evesham*, 1838, F. & F. 514; 2nd *Southwark*, 1796, Cliff. 232).

BY STATUTE.—The basis of the modern law as to bribery at elections is the Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102, which repeals all the earlier legislation on the subject (as to which, see Stephen, *Hist. Crim. Law*, vol. iii. p. 253, and Rogers on *Elections*, 17th ed., vol. ii. p. 262), and gives seven definitions of bribery which have been adopted by the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, Sched. III. Part III.

Statutory Definition.—Under secs. 2 and 3 of the Corrupt Practices Prevention Act, 1854, incorporated in the Corrupt and Illegal Practices Prevention Act, 1883, by sec. 3, and Sched. III. Part III., the following persons are to be deemed guilty of bribery:—

Giving Bribe.—(1) Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers, promises, or promises to procure or to endeavour to procure any money or valuable consideration (see *Cooper v. Slade*, 1856, 6 El. & Bl. 447; and *Simpson v. Yeend*, 1869, L. R. 4 Q. B. 626) to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or who corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any election (see *Cooper v. Slade*, 1857, 27 L. J. Q. B. 449):

(2) Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, or procures, or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting, or who corruptly does any such act as aforesaid on account of any voter having voted or refrained from voting at any election:

(3) Every person who, directly or indirectly, by himself or by any other

person on his behalf makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person in order to induce such person to procure or endeavour to procure the return of any person to serve in Parliament, or the vote of any voter at any election (see *Britt v. Robinson*, 1870, L. R. 5 C. P. 503):

(4) Every person who upon, or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procures or engages, promises or endeavours to procure the return of any person to serve in Parliament, or the vote of any voter at any election:

(5) Every person who advances or pays, or causes to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who knowingly pays, or causes to be paid, any money to any person in discharge or repayment of any money wholly or in any part expended in bribery at any election.

It is, however, expressly provided that the above provisions are not to extend or to be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election (as to which, see ELECTION EXPENSES). See *Cooper v. Slade*, 1857, 27 L. J. Q. B. at p. 454, and *Coventry*, 1869, 1 O'M. & H. at p. 101.

Receiving Bribe.—(6) Every voter who, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receives, agrees, or contracts for, any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting, or agreeing to vote, or for refraining or agreeing to refrain from voting at any election:

(7) Every person who, after any election, directly or indirectly, by himself, or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted, or refrained from voting, or having induced any other person to vote or to refrain from voting at any election.

WHAT CONSTITUTES BRIBERY.—Any gift, or offer, or promise of a gift made to a voter before voting, in order to induce him to vote or to refrain from voting, amounts to bribery, but any such act after the election done on account of the voter having voted or refrained from voting must be proved to have been done corruptly in order to constitute the offence of bribery within the statutory definition. As to the meaning of the word "corruptly," as construed by various judges, see *Cooper v. Slade*, 1856, 25 L. J. Q. B. at p. 329; *Bradford*, 1869, 1 O'M. & H. 36; *North Norfolk*, 1869, *ibid.* 242; *Limerick*, 1869, *ibid.* 261; *Brecon*, 1871, 2 O'M. & H. 44; *Stroud*, 1874, *ibid.* 184; *Harwich*, 1880, 3 O'M. & H. 71. It has been pointed out in a recent case, that an act which at the time it was done was legal cannot become bribery by the subsequent conduct of the party who did it (see per Pollock, B., *Lichfield*, 1896, 5 O'M. & H. 28).

Moreover, to upset an election on the ground of bribery committed after the election, the acts done subsequently to the election must be proved to have been connected with acts which were done previously, or to have been done with the privity of the member, as agency *primâ facie* terminates with the election (see *Salford*, 1869, 1 O'M. & H. 136; *Taunton* 1874, 2 O'M. & H. 67; *East Clare*, 1892, 4 O'M. & H. 163; see also AGENCY (ELECTION)).

The intention of the briber is the test of the offence (see *Westminster*, 1869, 1 O'M. & H. 90), and if that be corrupt, the intention of the recipient of the bribe is not material.

As to how far the drunkenness of an agent might afford an answer to a charge of bribery by him, see per Wills, J., *Montgomery*, 1892, 4 O'M. & H. 167.

The amount of a bribe is immaterial, for if a single act of bribery is clearly made out, and agency is proved, it will avoid an election, even though the act in itself might be insignificant (see *Blackburn*, 1869, 1 O'M. & H. 202; *Shrewsbury*, 1870, 2 O'M. & H. 37; *Norwich*, 1871, *ibid.* 41; *Pontefract*, 1893, 4 O'M. & H. 200). But very strict proof will be required before an election would be avoided on the ground of a single act of bribery (see per *Blackburn*, J., *Hastings*, 1869, 1 O'M. & H. 219).

FORMS OF BRIBERY.—Bribery, as will be observed from the above definitions, may assume an almost infinite variety of forms. The gift, loan, offer, or promise of money to or on behalf of voters, the giving, obtaining, or promising employment to voters, the employment of voters at elections for payment, the making of payments to voters in respect of travelling expenses, or in remuneration for loss of time, the payment of rates in order to qualify persons for registration as voters, the payment of subscriptions, or the distribution of food tickets, etc., under the guise of charity, may amount to bribery. For numerous other instances, see the cases collected in Rogers on *Elections*, 17th ed., vol. ii. ch. ix.

Offer of Bribe.—Where the evidence as to bribery consists merely of offers or proposals to bribe, the evidence required should be stronger than with respect to bribery itself (see *Cheltenham*, 1869, 1 O'M. & H. 64; *Mallow*, 1870, 2 O'M. & H. 22; *Carrickfergus*, 1880, 3 O'M. & H. 92; *Lancaster*, 1896). But a mere offer with a corrupt intention is sufficient to avoid an election, even where the person to whom the offer was made did not accept it, and even where such person was, in fact, disqualified from voting, provided that he was *prima facie* entitled to vote (see *Aylesbury*, 1859, Wolf. & B. 16; *Coventry*, 1869, 1 O'M. & H. 107; *Guildford*, 1869, *ibid.* 15).

Employment of Voters.—The giving of any office, place, or employment, whether it be permanent or temporary, to a voter, or to any other person in order to influence, and which does influence, a voter, is bribery (see *Oxford*, 1857, Wolf. & D. 108; *Nottingham*, 1843, Bar. & Arn. 165; *Kingston-upon-Hull*, 1859, Wolf. & B. 87; *Penryn*, 1869, 1 O'M. & H. 129; *Norwich*, 1871, 2 O'M. & H. 42; *Boston*, 1880, 3 O'M. & H. 152; *Oxford*, 1880, *ibid.* 155; *Rochester*, 1892, Day's El. Cas. 102). The employment of voters for payment, except in so far as it is allowed by the Act, is made illegal by sec. 17 of the Corrupt and Illegal Practices Prevention Act, 1883 (see ILLEGAL PRACTICES). Illegal employment does not, however, necessarily amount to bribery, and only avoids an election when committed by the election agent, but bribery committed by any agent would avoid the seat. A mere promise to procure or to endeavour to procure employment might be bribery; thus the promise of a situation in a hospital (*Lichfield*, 1869, 1 O'M. & H. 27), the promise to endeavour to procure a situation (*Plymouth*, 1853, 2 Pow. R. & D. 238), and the promise of refreshments *in futuro* (*Bodmin*, 1869, 1 O'M. & H. 124), in order to induce voters to vote or to refrain from voting, have been held to be bribery. •

Payment of Travelling Expenses.—The payment of money in respect of the travelling expenses of voters for conveyance of voters to the poll is now an illegal practice (see ILLEGAL PRACTICES); it may also amount to bribery, and so avoid the election (see *Cooper v. Slade*, 1858, 6 H. L. 747; *Coventry*, 1869, 1 O'M. & H. 109; *Dublin*, 1869, *ibid.* 273; *Horsham*, 1886, 3 O'M. & H. 52; *Pontefract*, 1893, 4 O'M. & H. 200; *Southampton*, 1895, 5 O'M. & H. 20; see, however, *Lancaster*, 1896).

Payment of Wages.—The fact of an employer allowing his workmen a reasonable time on the polling day to enable them to vote without making any deduction from their wages, does not amount to bribery, unless it be done with the corrupt intention of influencing votes (see the Parliamentary Elections Corrupt Practices Act, 1885, 48 & 49 Vict. c. 56; see also *Stroud*, 1874, 2 O'M. & H. 181). But, undoubtedly, a mode of bribery exists when persons having a large quantity of labour under their control give their workmen or labourers a holiday for the day of polling, apparently for the purpose of enabling them to exercise the franchise, but with the real intention of inducing them to vote for their employer, or for the candidate whom he supports (see per Field, J., *Aylesbury*, 1886, 4 O'M. & H. 60; see also *Stalybridge*, 1869, 1 O'M. & H. 66; *Gravesend*, 1880, 3 O'M. & H. 84).

Payment of Rates.—Any person who, either directly or indirectly, corruptly pays any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election, and any candidate or other person who, either directly or indirectly, pays any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting, and any person on whose behalf and with whose privity any such payment is made, is guilty of bribery (see the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, s. 49; the Representation of the People (Scotland) Act, 1868, 31 & 32 Vict. c. 48, s. 49; and the Corrupt and Illegal Practices Prevention Act, 1883, s. 3, and Sched. III. Part III.; see also *Beverley*, 1869, 1 O'M. & H. 145; *Oldham*, 1869, *ibid.* 164; *Taunton*, 1869, *ibid.* 183; *Hastings*, 1869, *ibid.* 219; *Cheltenham*, 1869, *ibid.* 63; *Wigan*, 1869, *ibid.* 190).

As to bribery by payment of university registration fee, see the Universities Elections Amendment (Scotland) Act, 1881, 44 & 45 Vict. c. 40, s. 2; and Sched. III. Part III. of the Corrupt and Illegal Practices Prevention Act, 1883.

Charities.—The gift of subscriptions to charities, or the distribution of money or gifts under the colour of charity, with the intention of influencing an election, may amount to bribery (see *Stafford*, 1869, 1 O'M. & H. 230), but does not do so in the absence of corrupt intention (*Westbury*, 1869, 1 O'M. & H. 49; *Youghal*, 1869, *ibid.* 294; *Windsor*, 1874, 2 O'M. & H. 89; *Boston*, 1874, *ibid.* 161; *Salisbury*, 1883, 4 O'M. & H. 28; *Lichfield*, 1895, 5 O'M. & H. 27). As to bribery by distribution of food tickets, see *Shoreditch*, 1896, 5 O'M. & H. 72; *Tower Hamlets*, 1896, *ibid.* 91. Before the Court will come to the conclusion that the distribution of charity in any particular case is bribery, it must be clearly proved that the motive of the person so using it was dishonest and corrupt. Whether this is so or not is a matter of inference to be drawn from the facts of each particular case, and must depend upon many circumstances, involving those of time, place, the persons by whom the charity is distributed and by whom it is received, whether it has been given in pursuance of an accustomed course, or whether it is novel and unprecedented, whether it is moderate or immoderate in amount, and especially whether the persons to whom it is given are proper recipients (per Pollock, B., *Tower Hamlets*, 1896, 5 O'M. & H. 94).

GENERAL BRIBERY.—Apart from legislation, an election will be avoided at common law where it is proved that bribery prevailed so generally and extensively as to interfere with the freedom of election. Thus an election would by the common law be void where it is proved that there existed bribery to a large extent, that it came from unknown quarters, but that people were bribed generally and indiscriminately (see *Bradford*,

1869, 1 O'M. & H. 40; *Bridgwater*, 1869, *ibid.* 115; *Beverley*, 1869, *ibid.* 147; *Drogheda*, 1869, *ibid.* 257).

General bribery invalidates an election irrespective of agency, and it is unnecessary to trace any act of bribery to the member or his agents where general bribery is proved (*Lichfield*, 1869, 1 O'M. & H. 26); it must, however, be shown that the general bribery was in favour of the candidate who was elected, for it would be impossible for a person who had been fairly elected to be unseated merely because his opponents had been largely guilty of bribery (see *Ipswich*, 1886, 4 O'M. & H. 71).

(2) TREATING.

AT COMMON LAW.—The giving of entertainment to voters with the corrupt intention of influencing an election was an offence at common law, being in fact a species of bribery (see per Lord Lyndhurst in *Hughes v. Marshal*, 1831, 2 Tyrw. at p. 138; see also as to the history of treating at parliamentary elections, 9 Com. Journ. 411; 10 Com. Journ. 469; 1 *Whitlocke*, 387; 2nd *Southwark*, 1796, Cliff. 156; *ibid.* 232; *Herefordshire*, 1803, 1 Peck. 191).

STATUTORY DEFINITION.—The offence of treating is now defined by sec. 1 of the Corrupt and Illegal Practices Prevention Act, 1883, under which any person who corruptly by himself, or by any other person, either before, during, or after an election, directly or indirectly, gives or provides or pays, wholly or in part, the expense of giving or providing any meat, drink, entertainment, or provision, to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting at such election, is guilty of treating, and every elector who corruptly accepts or takes any such meat, drink, entertainment, or provision is also guilty of treating.

Under the earlier statutes (7 & 8 Will. III. c. 4; 5 & 6 Vict. c. 102; 17 & 18 Vict. c. 102, s. 4) candidates alone were liable to punishment for treating. The Act of 1883 repeals the earlier legislation on the subject, and, as will be observed from the above section, extends the liability to persons other than candidates, and makes the person receiving, as well as the person giving, guilty of treating.

WHAT AMOUNTS TO TREATING.—To constitute the offence of treating so as to avoid an election, it must be proved that the act was done corruptly, *i.e.* with a corrupt intention. It has been said that the word "corruptly" means with the object and intention of doing that which the Legislature plainly means to forbid (see *Burdley*, 1869, 1 O'M. & H. 19; *Lichfield*, 1869, *ibid.* 23; *Wallingford*, 1869, *ibid.* 58; *Hereford*, 1869, *ibid.* 195; *North Norfolk*, 1869, *ibid.* 242; *Carrickfergus*, 1880, 3 O'M. & H. 91; *Louth*, 1880, *ibid.* 164).

The treating must have reference to some election, and be for the purpose of influencing some vote (*Norwich*, 1886, 4 O'M. & H. 91; *Montgomery*, 1892, Day's El. Cas. 150; *Tower Hamlets*, 1896, 5 O'M. & H. 100).

In order to prove treating, it must be shown not merely that eating and drinking went on during the election, and went on under the eyes of the candidate, but it must be shown that the eating and drinking was supplied at the expense or upon the credit of the candidate, either by his authority or by the authority of one or more of his agents, in order to influence voters (per Willes, J., *Lichfield*, 1869, 1 O'M. & H. 26).

The act must be done in order to induce the voter to vote or abstain from voting; whether or not any particular act was so done is, of course, a question of intention, and the intention is a matter of inference to be drawn from the evidence of all the circumstances in each case (see *Carrickfergus*, 1869, 1 O'M. & H. 268; *Stroud*, 1874, 2 O'M. & H. 184; *Louth*, 1880, 3 O'M. & H. 161; *Rochester*, 1892, 4 O'M. & H. 156; *Lancaster*, 1896, 5 O'M. & H. 44; *Shoreditch*, 1896, *ibid.* 80; *Tower Hamlets*, 1896, *ibid.* 100).

In ascertaining the intention it is important to consider on what scale and to what extent the treating was carried on, though even the smallest amount of food or drink given with the intention of influencing votes would avoid the election (*Bewdley*, 1869, 1 O'M. & H. 19; *Westbury*, 1869, *ibid.* 50; *Wallingford*, 1869, *ibid.* 59; *Wigan*, 1881, 4 O'M. & H. 13). If, indeed, it can be proved that drink was supplied by an agent of the member to even a single voter under such circumstances that the Court is satisfied that it was intended thereby to gain the vote of that man, the election must be declared void (see *Tamworth*, 1869, 1 O'M. & H. 83; see also *Bradford*, 1869, *ibid.* 36, 39; *Stroud*, 1874, 2 O'M. & H. 113). So where food or drink is given for the purpose of inducing voters to change their minds and to vote for the party to which they do not belong (see *Coventry*, 1869, 1 O'M. & H. 106), or where the intention is to gain popularity or to avoid unpopularity, and thereby to affect the election (see *Wallingford*, 1869, 1 O'M. & H. 58; *Mallow*, 1870, 2 O'M. & H. 22; *Louth*, 1880, 3 O'M. & H. 161), the act is corrupt and constitutes the offence of treating. The question of corrupt treating, as was said in a recent case (per Pollock, B., *Tower Hamlets*, 1896, 5 O'M. & H. 100), must be in each case a question of fact. If the refreshments provided were excessive, if the occasions were numerous, and if there were other circumstances calculated to excite suspicion, a corrupt intention might be inferred.

On the other hand, in the absence of corrupt intention, the mere fact of giving food or drink does not amount to the offence of treating (see *Windsor*, 1869, 1 O'M. & H. 3; *Coventry*, 1869, *ibid.* 106; *Aylesbury*, 4 O'M. & H. 63; *Montgomery*, 1892, Day's El. Cas. 150). The mere exercise of hospitality is *prima facie* not an offence (see per Field, J., *Barrow-in-Furness*, 1886, 4 O'M. & H. 79), and the statute has been said not to apply to reciprocal treating between social equals, nor to treating in relation to business matters or in return for small services (see per Cave, J., *Norwich*, 1886, 4 O'M. & H. 91); thus it has been held that the giving of drinks by brewers in order to increase business, even though during an election, was not corrupt treating (*Rochester*, 1892, Day's El. Cas. 102; *Montgomery*, 1892, *ibid.* 151).

Treating of non-Electors.—The offence of treating is not limited to the giving of entertainment to voters; the treating of non-electors may be illegal and corrupt just as much as the treating of voters (see *Bewdley*, 1869, 1 O'M. & H. 19; *Wallingford*, 1869, *ibid.* 58; *Longford*, 1870, 2 O'M. & H. 15). The treating of women in order to influence the votes of their male relatives or friends also constitutes the offence (see *Tamworth*, 1869, 1 O'M. & H. 86). The acceptance of such entertainment by persons who are not electors is not, however, an offence, though the corrupt acceptance by an elector makes him guilty of the offence of treating (*vide supra*).

Treating by Political Associations.—As to the circumstances under which entertainments given by political associations may support charges of treating, see *Hexham*, 1892, 4 O'M. & H. 150; *Rochester*, 1892, *ibid.* 158; *Lancaster*, 1896, 5 O'M. & H. 42. The practice of political associations giving entertainments, such as smoking concerts, picnics, suppers, teas,

spots, etc., has been condemned as being dangerously akin to corrupt treating (see *Hexham*, 1892, 4 O.M. & H. 150; *Rochester*, 1892, *ibid.* 160; *Lancaster*, 1896, 5 O.M. & H. 43).

Treating before the Election.—Treating being a corrupt practice may avoid an election whenever committed. Treating may be committed either before, during, or after an election (see Corrupt and Illegal Practices Prevention Act, 1883, s. 1). An election has even been avoided for acts of corrupt treating which took place before the dissolution of the Parliament which caused the vacancy (*Youghal*, 1869, 1 O.M. & H. 291), and in another case treating was held to have been committed more than a year before the election (*Hexham*, 1892, 4 O.M. & H. 147).

Treating after the Election.—As a general rule, agency terminates with the election (see AGENCY (ELECTION)); hence acts of treating which would have avoided the election if done before or during the election will not, as a general rule, affect the seat if done after the election, unless done by the member personally, or by someone for whose acts he continues to be responsible.

Where after an election entertainment is given with the knowledge of the member to electors who had voted for him, in order to amount to a corrupt practice such treating must be connected with something which preceded the election; in other words, it must be the complement of something done or existing before the election calculated to influence the voter while the vote lies in his power. Thus invitations given before the election to entertainments which take place afterwards, or even promises to invite to a subsequent entertainment, would constitute the offence of corrupt treating (see *Brecon*, 1871, 2 O.M. & H. 45; *Poole*, 1874, *ibid.* 125; *Kidderminster*, 1874, *ibid.* 173; *Harwich*, 1880, 3 O.M. & H. 71). But treating after an election with a view to secure the future support of voters is not corrupt as regards the past election, though it may affect a future election (see per Lush, J., *Brecon*, 1871, 2 O.M. & H. 43).

GENERAL TREATING.—Where the existence of treating on such a scale as to produce a general corruption of the constituency is proved, the election would be void at common law on the ground of general treating, even though the treating could not be traced to the member or any of his agents (see *Bradford*, 1869, 1 O.M. & H. 41; *Tamworth*, 1869, *ibid.* 85; *Beverley*, 1869, *ibid.* 149; *Drogheda*, 1869, *ibid.* 258; *St. Ives*, 1875, 3 O.M. & H. 13). In order to avoid the election, however, on the ground of general treating, it must be proved that the treating was in favour of the person elected, and that the treating was so extensive as to interfere with the freedom of election (*Ipswich*, 1886, 4 O.M. & H. 71; *Pontefract*, 1893, Day's El. Cas. 129; see also *Southampton*, 1895).

(3) UNDUE INFLUENCE.

AT COMMON LAW.—The undue influence of a voter appears not to have been recognised as an offence at common law, although corrupt influence exercised by means of bribery or treating has always been regarded as an offence tending to interfere with the freedom of elections. But a vote to be a good vote must be freely given (see *Windsor*, 1869, 1 O.M. & H. 6), and a vote obtained by intimidation is at common law void, whether the person using the threat had the power to carry it out or not, provided that the voter was in fact influenced in such a manner by the representation made to him that he gave his vote under protest; a vote so given would be struck off on a scrutiny (see *Oldham*, 1869, 1 O.M. & H. 162; see also *Bradford*, 1869, *ibid.* 40; and SCRUTINY).

As to the history of undue influence at elections, see 3 Edw. I. c. 5, and the Resolutions of the House of Commons in 1641 (2 Com. Journ. 337), 1645 (4 Com. Journ. 346), 1700 (13 Com. Journ. 333), 1741 (24 Com. Journ. 37), 1779 (37 Com. Journ. 507), and 1802 (57 Com. Journ. 34, 376); see also the cases and statutes collected in Rogers on *Elections*, 17th ed., vol. ii. pp. 311-313, with regard to undue influence at elections by peers, ministers, and servants of the Crown, the military and police.

STATUTORY DEFINITION.—The offence of undue influence is now defined by sec. 2 of the Corrupt and Illegal Practices Prevention Act, 1883, under which every person who, directly or indirectly, by himself, or by any other person on his behalf (see AGENCY (ELECTION)), makes use of, or threatens to make use of any force, violence, or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss, upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who by abduction, duress, or any fraudulent device or contrivance impedes the free exercise of the franchise of any elector, or thereby compels, induces, or prevails upon any elector either to give, or to refrain from giving, his vote at any election, is guilty of undue influence.

This section replaces, without in effect altering, the former definition of undue influence contained in sec. 5 of the Corrupt Practices Prevention Act, 1854. The words "temporal or spiritual" are, however, inserted before the words "injury, damage, harm, or loss."

WHAT AMOUNTS TO UNDUE INFLUENCE.—The mere fact of a person having influence and intentionally retaining it is not alone evidence of unduly exercising that influence (see per Willes, J., *Windsor*, 1869, 1 O'M. & H. 6), for all influence is not necessarily corrupt (see *Galway*, 1872, 2 O'M. & H. 55). It is, as has been said, the abuse of influence with which alone the law can deal. Influence cannot be said to be abused because it exists and operates; it is only abused where an inducement is held out to the voters to vote or not to vote at an election (*Lichfield*, 1869, 1 O'M. & H. 28). If, indeed, influence be used with a view to affect votes, or to interfere with the free exercise of the franchise, it is undue influence, but whether the voter be the person ill-treated, or whether the ill-treatment be violence or damage done by the removal of custom, or business, or employment, is immaterial (see *Blackburn*, 1869, 1 O'M. & H. 204).

It has been said that an election is not to be set aside because of an act of undue influence by an agent, unless it was one that was calculated to affect and did affect the election (*Longford*, 1870, 2 O'M. & H. 17). In an earlier case, however, it was laid down that the mere attempt on the part of an agent to intimidate a voter, even though it were unsuccessful, would avoid an election (*Northallerton*, 1869, 1 O'M. & H. 173), and the wording of the section appears to support this construction.

It will be observed that the statute prohibits as undue influence the use or threat of open force or violence, and the infliction or threat of any temporal or spiritual injury, damage, harm, or loss, in order to induce or compel a voter to vote or not to vote, and also the interference with the due exercise of the franchise by means of abduction, duress, or any fraudulent device or contrivance. Using any violence, or threatening any damage, or resorting to any fraudulent contrivance, to restrain the liberty of a voter, so as either to compel or frighten him into voting or abstaining from voting otherwise than he freely wills, constitutes the offence (see *Lichfield*, 1869, 1 O'M. & H. 25).

Using Force or Violence.—An election was avoided where an agent the member incited the mob to beat and molest people so as to prevent voters from coming to the poll (*Stafford*, 1869, 1 O'M. & H. 228); and any force threatened or used towards a voter to compel him to vote would avoid the election (see *North Norfolk*, 1869, 1 O'M. & H. 240).

The intimidation to be within the statute must be personal and direct intimidation of the individual voter, as the statute does not refer to general intimidation (see *Nottingham*, 1869, 1 O'M. & H. 246; *Cheltenham*, 1869, *ibid.* 64; *North Durham*, 1874, 2 O'M. & H. 156).

Undue influence will avoid an election only when it is exercised by a candidate or by his agents (see *North Norfolk*, 1869, 1 O'M. & H. 240; *Stafford*, 1869, *ibid.* 233; *North Durham*, 1874, 2 O'M. & H. 156). In order, therefore, to avoid an election on the ground of intimidation and undue influence, either it must be shown that the rioting or violence was instigated by the member or his agents for whom he is responsible, or it must be shown that it was to such an extent as to prevent the election being an entirely free election (*Stalybridge*, 1869, 1 O'M. & H. 72; *Galway*, 1874, 2 O'M. & H. 200; as to general intimidation, see *post*). With regard to undue influence, the candidate and his agents are put upon the same footing (see *Westbury*, 1869, 1 O'M. & H. 53).

Infliction of Injury, Loss, etc.—In prohibiting the infliction of any temporal or spiritual injury, damage, harm, or loss, or the threat thereof, the statute is aimed at such undue influence as may be exercised by such means as the withdrawal of custom from a tradesman, the dismissal of servants or workmen from employment, the eviction, or threat of eviction, of a tenant by a landlord, spiritual intimidation, etc.

Withdrawal of Custom.—The actual withdrawal of custom or the threat to withdraw custom from a tradesman, if done or made with a view to affect a voter or to interfere with the free exercise of the franchise, is undue influence (see *Blackburn*, 1869, 1 O'M. & H. 204; see also *North Durham*, 1874, 2 O'M. & H. 158; *North Norfolk*, 1869, 1 O'M. & H. 241). A threat to a Baptist minister to give up pews in his chapel if he voted as he wished would amount to intimidation (*Northallerton*, 1869, 1 O'M. & H. 168).

Dismissal from Employment.—The dismissal of voters from employment shortly before an election in consequence of their politics being different from those of their employers may amount to undue influence (see *Blackburn*, 1869, 1 O'M. & H. 203). So where a master employs a servant who in all probability would in the ordinary course of things continue in his employment, the master may, of course, dismiss him at pleasure after giving him proper notice; but if he does it on account of the vote and for the purpose of coercing the voter, it is an infliction of loss within the statute (*North Norfolk*, 1869, 1 O'M. & H. 241); and the wrongful dismissal by an employer of voters from his employment shortly before an election upon the ground of his political opinion, is evidence of intimidation (see *Blackburn*, 1869, 1 O'M. & H. 204). A mere threat to discharge a servant might constitute the offence; thus it has been said that if a candidate who is an employer of labour were to inform all persons in his employ either that he would discharge any man who did not vote for him, or that he would discharge any man who voted for the other candidate, that would avoid the election (see *Westbury*, 1869, 1 O'M. & H. 53; see also *Oldham*, 1869, *ibid.* 161).

Eviction by Landlord.—The statute does not preclude, nor was it attempted to preclude, the exercise of that legitimate influence which a landlord has a

right to use (see *North Norfolk*, 1869, 1 O'M. & H. 237; *Tipperary*, 1870, 2 O'M. & H. 31; *Galway*, 1872, 2 O'M. & H. 55). So where a landlord said to a number of his tenants, "If you can vote for my friend I shall be delighted if you will do so; if you cannot vote for him, at all events stay at home, and do not vote against him," it was held that he had not overstepped the bounds of the legitimate influence which he had a right to exercise (*Galway*, 1872, 2 O'M. & H. 54); and the fact that tenants who were in arrear of rent had all voted the way their landlord wished, on the understanding, as it was submitted, that they should not be pressed for their rent, did not in itself prove any undue exercise of such influence (see *Windsor*, 1869, 1 O'M. & H. 6). A landlord has, of course, a perfect right to choose his tenant and, after proper notice, to evict him. If, however, on the other hand, a landlord threatens to evict his tenant in order to secure his vote, or actually does evict the tenant on account of his vote, that amounts to an infliction of harm or loss within the meaning of the section (see *North Norfolk*, 1869, 1 O'M. & H. 241). But a threat must be an operative threat at the time of the election; so where it was proved that the respondent had after a previous election evicted a number of his tenants for not having voted for him, it was held that this would not avoid a subsequent election, unless it could be shown that its effect continued to operate on the minds of the tenants at the time of the election, though it was admissible as evidence of intimidation, as it might imply a threat of future evictions (*Windsor*, 1874, 2 O'M. & H. 91; see also *Petersfield*, 1874, *ibid.* 95).

Spiritual Intimidation.—The threat or the infliction of any spiritual injury, damage, harm, or loss, is expressly prohibited by sec. 2 of the Act of 1883. Before that enactment there was no express legislative prohibition of the undue exercise of spiritual influence; the decisions of the election committees, and subsequently of the election judges, had, however, clearly established that it was illegal (see *Mayo*, 1853, 2 Pow. R. & D. 204; *Sligo*, 1853, *ibid.* 258; *Mayo*, 1857, Wolf. & D. 27; *Galway*, 1869, 1 O'M. & H. 307; *Longford*, 1870, 2 O'M. & H. 14; *Galway*, 1872, *ibid.* 57; *Tipperary*, 1870, *ibid.* 31).

The exercise by the clergy of their legitimate influence has always been recognised as lawful (see *Tipperary*, 1870, 2 O'M. & H. 31; *Galway*, 1872, *ibid.* 57). It is the undoubted right of the clergy to canvass and induce persons to vote in a particular way. In the proper exercise of his influence the priest may, as has been said, counsel, advise, recommend, entreat, and point out the true line of moral duty, and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale. But he must not hold out hopes of reward here or hereafter, and he must not use threats of temporal injury, or of disadvantage, or of punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability, or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter or to affect an election, he is guilty of undue influence (see *Longford*, 1870, 2 O'M. & H. 16; *South Meath*, 1892, 4 O'M. & H. 132).

Undue influence by means of spiritual intimidation, by which is meant the infliction or threat of any spiritual injury, harm, or loss, with the object of influencing votes, through the agency of the clergy, will avoid an election (see *South Meath*, 1892, 4 O'M. & H. 130; *North Meath*, 1892, 4 O'M. & H. 185; see also *Galway*, 1872, 2 O'M. & H. 57; *Galway*, 1874, *ibid.* 200).

Abduction, Duress, Fraud, etc.—The statute also prohibits the interference

with the due exercise of the franchise by abduction, duress, or any fraudulent device or contrivance. The forcible abduction of a voter, or duress exercised upon a voter, would be using force, violence, or restraint within the section. The provision, however, appears to be more especially directed against the prevention of a voter from giving his vote by means of some trick or other species of fraud, as by making him intoxicated, or inducing him to be absent from the election by some pretence (see *Cockermouth*, 1853, 2 Pow. R. & D. 166; *Lisburn*, 1863, Wolf. & B. 227).

Wherever there is a fraudulent device of any sort to prevent a voter from voting in a certain way, that would be an offence within the Act (see *Gloucester*, 1873, 2 O'M. & H. 61; see also *Northallerton*, 1869, 1 O'M. & H. 170); thus the sending of voting cards which are intended to induce persons to believe that they could not vote for one candidate, but that their votes would only be valid if given for the other candidate, would be a fraudulent device (*Gloucester*, 1873, *supra*); the intention to mislead is an essential to the offence. It would seem that in order to avoid an election on this ground there must be proof that some elector or electors had been actually prevented from voting, the mere fact that cards were sent which were calculated to deceive being apparently not sufficient, though as to this there is some difference of opinion (see *Stepney*, 1886, 4 O.M. & H. 57; see also *Down*, 1880, 3 O'M. & H. 123).

GENERAL INTIMIDATION.—It has been pointed out above that the provisions of the statute apply only to undue influence exercised over individual voters by a candidate or his agents. But an election is void at common law if it can be proved that there was intimidation of such a character, so general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency (see *North Durham*, 1874, 2 O'M. & H. 156; see also *Morpeth*, 1774, 1 Doug. 147; *Nottingham*, 1803, 1 Peck. 85; *Knarcsborough*, 1805, 2 Peck. 382; *Coventry*, 1706, 15 Com. Journ. 276; *Westminster*, 1722, 20 Com. Journ. 53; *Coventry*, 1722, *ibid.* 60; *Clare*, 1853, 2 Pow. R. & D. 246). Where there is general intimidation by rioting or violence, or by undue spiritual influence, to such an extent as to violate the freedom of election and to prevent persons from freely exercising their franchise and giving their votes, the election is void, and in such case it is not necessary to show that the violence was instigated by the member or his agents (see *Cheltenham*, 1869, 1 O'M. & H. 64; *Stalybridge*, 1869, *ibid.* 72; *Salford* 1869, *ibid.* 140; *Stafford*, 1869, *ibid.* 229; *Nottingham*, 1869, *ibid.* 246; *Drogheda*, 1869, *ibid.* 254; *Sliyo*, 1869, *ibid.* 300; *Galway*, 1872, 2 O'M. & H. 56; *Dudley*, 1874, *ibid.* 120; *North Meath*, 1892, 4 O'M. & H. 188).

In order to avoid an election on the ground of general rioting and intimidation, it must be shown that the violence was of such an extent as to prevent persons of ordinary nerve and courage from recording their votes (see *Thornbury*, 1886, 4 O'M. & H. 67; see also *Salford*, 1869, 1 O'M. & H. 141; *Nottingham*, 1869, *ibid.* 246). But where the intimidation is so general that it might reasonably be supposed to affect the result of the election, it is not necessary to show that the result was in fact affected thereby (see *South Meath*, 1892, 4 O'M. & H. 142; *North Meath*, 1892, *ibid.* 188; see also *Drogheda*, 1869, 1 O'M. & H. 254; *North Durham*, 1874, 2 O'M. & H. 157).

(4) PERSONATION.

STATUTORY DEFINITION.—The Corrupt and Illegal Practices Prevention Act, 1883 (s. 3 and Sched. III. Part III.), adopts the definition of per-

sonation contained in sec. 24 of the Ballot Act, 1872, 35 & 36 Vict. c. 33, under which a person is for all purposes of the laws relating to parliamentary and municipal elections to be deemed to be guilty of the offence of personation, who, at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who having voted once at any such election applies at the same election for a ballot paper in his own name.

As to the earlier legislation on the subject, see 35 Geo. III. c. 29, s. 54; 60 Geo. III. and 1 Geo. IV. c. 11, s. 86; 4 Geo. IV. c. 55, s. 82; and 6 & 7 Vict. c. 18, ss. 83 and 84.

Personation, and aiding, abetting, counselling, or procuring the commission of the offence of personation are corrupt practices and felonies (see the Corrupt and Illegal Practices Prevention Act, 1883, s. 3 and s. 6 (2)); as to the punishment and other penalties and consequences of which, see above.

WHAT CONSTITUTES PERSONATION.—The application for a ballot paper in the name of any person other than that of the applicant, or the application in his own name for a second ballot paper after he has already voted at the election, constitutes the offence. Where there are two persons of the same name, and one only of them is on the register of voters, if the other votes he will be guilty of personation, and his vote must be struck off, this being an application in the name of some other person, notwithstanding the fact that the applicant happens to have the same name as the person on the register (see *Oldham*, *Rothwell's* case, 1869, 20 L. T. 314; *Berwick*, *Clark's* case, 1881, 44 L. T. 290).

Innocent Personation.—The offence of personation involves corrupt intention; if, therefore, a vote be given by a person innocently, under the honest belief that he had a qualification, and was voting with a right, no offence is committed, for where the corrupt intention is absent the offence of personation cannot be committed, personation being a corrupt practice, and only an offence against election law if it is corrupt (see *Stepney*, 1886, 4 O'M. & H. 44; see also *Oldham*, 1869, 1 O'M. & H. 152; *Gloucester*, 1873, 2 O'M. & H. 64; *Athlone*, 1880, 3 O'M. & H. 59; *Finsbury*, 1892, Day's El. Cas. 50). So where a voter who had been inadvertently, and in contravention of the Redistribution of Seats Act, 1885, s. 8 (3), registered as being entitled to vote for two divisions of a borough, voted twice, under the honest belief that he had a right to do so, it was held that the first vote was good, and that he, having no corrupt intention, was not guilty of the offence of personation, but that the second vote was void, and ought to be struck off (*Stepney*, 1886, 4 O'M. & H. 44); and when a person who is inadvertently registered on the register of voters in a name that is not his own, applies for a ballot paper in that name, he is not guilty of personation (*R. v. Fox*, 1887, 16 Cox C. C. 166). So, also, if two persons are improperly on the register in respect of the same premises, both of them are entitled to vote, and neither is guilty of personation (see *Oldham*, 1869, 20 L. T. 315).

Agency must be Proved.—In order to avoid an election on the ground of personation, it must be proved that the personation was committed by an agent of the candidate. An election is not avoided at common law by general personation, and to avoid it under the Corrupt and Illegal Practices Prevention Act, 1883, it is necessary to prove agency (see *West Belfast*, 1886, 4 O'M. & H. 108; see also AGENCY (ELECTION)). In one case where an attempt was made to induce a man to personate an absent voter, it was said that if it could be established that an agent of the member had got voters personated it would be sufficient fraud at common law to set aside the election (*Coventry*,

1869, 1 O'M. & H. 105; see now sec. 5 of the Corrupt and Illegal Practices Prevention Act, 1883).

In a recent case certain persons were proved to have personated voters, but the election was not affected, as they were not agents of the member (*Hexham*, 1892; see Day's El. Cas. 68; see also *Shoreditch*, 1896). In the same case, persons who were agents were proved to have attempted to induce the same individuals to vote, but as the agents did not know that such persons were not entitled to vote they were not guilty of aiding and abetting personation; it was said, however (per Cave, J. *ibid.*), that agents might be guilty of aiding and abetting personation who corruptly induced a person to vote, although such person was not guilty of personation because he did not know that he was not entitled to vote.

Evidence of Personation.—Where a person on the register of voters is proved not to have voted, and it is at the same time proved that a vote has been given in his name, this is evidence of personation (*Finsbury*, 1892, 4 O'M. & H. 175).

PROSECUTION FOR PERSONATION.—Under the Parliamentary Registration Act, 1843, 6 & 7 Vict. c. 18, s. 85, the candidates may appoint agents to attend at the polling booths for the purpose of detecting personation. The same Act (s. 86) provides that, if at the time any person tenders his vote at an election, or after he has voted, and before he leaves the polling booth, any such agent so appointed declares to the returning officer, or his deputy, presiding at the polling booth, that he believes and undertakes to prove that the person so voting is not in fact the person in whose name he assumes to vote, then the returning officer or his deputy must immediately, after such person has voted, by word of mouth order any constable to take the person so voting into custody, and such order is a sufficient warrant and authority to the constable for so doing. The returning officer or his deputy is not, however, entitled to reject the vote of such person if he answers in the affirmative the questions authorised by the Act (see **BALLOT**); but the returning officer or his deputy is to cause the words "protested against for personation" to be placed against the vote of the person so charged with personation when entered in the polling-book. Persons so charged with personation are to be taken before two justices of the peace; if two justices cannot be found within three hours after the close of the poll on the day of the arrest, one justice may liberate the person on his entering into recognisances with one surety; and if no justice can be found within four hours after the closing of the poll, then such person is to be forthwith discharged from custody; but in such case the charge may be subsequently inquired into, and a warrant may, if necessary, be issued for the apprehension of the persons charged (*ibid.* s. 87). If, upon hearing the charge, the two justices are satisfied upon the evidence on oath of not less than two credible witnesses that the person charged is guilty of personation, they must commit him for trial (*ibid.* s. 88); and if they are satisfied that there is no foundation for the charge, they are to make an order for the agent making the charge to pay any sum not exceeding ten pounds and not less than five pounds by way of damages and costs; if the person falsely charged consents to accept such compensation, no action or other proceedings will lie in respect of the charge (*ibid.* s. 89).

It is, moreover, the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation, at the election for which he is returning officer (Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 24).

The public prosecutor and the Attorney-General have also power to institute a prosecution for personation as for any other corrupt practice (see the Corrupt and Illegal Practices Prevention Act, 1883, ss. 43, 45, and 60; see also under the head *Prosecution for Corrupt Practices, supra*).

(5) FALSE DECLARATION OF ELECTION EXPENSES.

RETURN OF ELECTION EXPENSES.—It is the duty of the election agent of every candidate, within thirty-five days after the day on which the candidates returned at an election are declared elected, to transmit to the returning officer a true return of the election expenses (see the Corrupt and Illegal Practices Prevention Act, 1883, s. 33 (1); as to what are election expenses and the mode of return, see **ELECTION EXPENSES**). The return so transmitted to the returning officer must be accompanied by a declaration made by the election agent before a justice of the peace in the form given in the Act; and at the same time that the agent transmits the return, or within seven days afterwards, the candidate must transmit to the returning officer a similar declaration as to the election expenses (see the Corrupt and Illegal Practices Prevention Act, 1883, s. 33 (2) and (4), and Sched. II.).

KNOWINGLY MAKING FALSE DECLARATION.—If any candidate or election agent knowingly makes the declaration required by the Act falsely, he is guilty of an offence, and on conviction thereof on indictment he is liable to the punishment for wilful and corrupt perjury. Such an offence is also a corrupt practice (*ibid.* s. 33 (7)); as to the punishment and consequences of which, see *supra*.

II. CORRUPT PRACTICES AT MUNICIPAL AND OTHER ELECTIONS.

MUNICIPAL ELECTIONS.—The law as to corrupt practices at municipal elections is assimilated to that at parliamentary elections, and is now based upon the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, Part IV., as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70.

Corrupt practices at municipal elections are the same as at parliamentary elections, viz.: (1) bribery; (2) treating; (3) undue influence; (4) personation, and aiding, abetting, counselling, and procuring the commission of the offence of personation (see s. 2 and Sched. III. of the Act of 1884); and (5) knowingly making a false declaration as to election expenses (*ibid.* s. 21 (5)). Under the Municipal Corporations Act, 1882, s. 77, which is adopted by the Act of 1884 (see s. 2 and Sched. III.), bribery, treating, undue influence, and personation include respectively anything done before, at, after, or with respect to a municipal election, which, if done before, at, after, or with respect to a parliamentary election, would make the person doing the same liable to any penalty, punishment, or disqualification for bribery, treating, undue influence, or personation, as the case may be, under any Act for the time being in force with respect to parliamentary elections.

It is expressly provided by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 2 (2), that a person who commits any corrupt practice in reference to a municipal election is guilty of the like offence, and is, on conviction, liable to the like punishment and subject to the like incapacities as if the corrupt practice had been committed in reference to a parliamentary election.

A municipal election will also be avoided by such general corruption, bribery, treating, or intimidation, at the election as would, by the common

law of Parliament, avoid a parliamentary election (Municipal Corporations Act, 1882, s. 81).

The procedure as to prosecutions for corrupt practices at municipal elections is regulated by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and is similar to that in force with regard to parliamentary elections.

Where, upon the trial of a municipal election petition, the Election Court report that any corrupt practice other than treating and undue influence has been committed by, or with the knowledge and consent of, any candidate, or that the offence of treating or undue influence has been committed by any candidate, that candidate is not capable of ever holding a corporate office in the borough, and if he has been elected, his election is void; and he is further subject to the same incapacities as if, at the date of the report, he had been convicted of a corrupt practice (*ibid.* s. 3 (1)). Upon the trial of a municipal election petition, where there is a charge of any corrupt practice, the Election Court must report in writing to the High Court whether any of the candidates has been guilty by his agents of any corrupt practice in reference to the election, and if the Election Court reports that he has, then he is not capable of being elected to or holding any corporate office in the borough during a period of three years from the report, and if he has been elected, his election is void (*ibid.* s. 3 (2)).

As to the application of the Act to municipal elections in the city of London, see sec. 35.

SCHOOL BOARD ELECTIONS, ETC.—The provisions of Part IV. of the Municipal Corporations Act, 1882, with regard to corrupt practices at municipal elections, as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, are, subject to the necessary modifications, extended to elections of members of Local Boards, Improvement Commissioners, Poor Law Guardians, and School Boards by sec. 36 of the latter Act.

COUNTY COUNCIL ELECTIONS.—The same provisions, subject to the necessary modifications, are applied to County Council elections by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 75.

PARISH COUNCIL ELECTIONS, ETC.—The same provisions are also extended by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 48 (3) and (8), to Parish Council elections, and other elections under the Act, subject to adaptations, alterations, and exceptions, made by rules framed under the Act.

III. CORRUPT PRACTICES BY PUBLIC BODIES.

As to bribery and corruption of and by members, officers, or servants of corporations, councils, boards, commissioners, or other public bodies, see the Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. c. 69; see also the article **BRIBERY**.

See also **AGENCY (ELECTION)**; **BALLOT**; **CANDIDATE**; **ELECTION COMMISSIONERS**; **ELECTION PETITION**; **ILLEGAL PRACTICES**; **RELIEF**; **RETURNING OFFICER**; **SCRUTINY**; etc.

[*Authorities.*—See, further, Rogers on *Elections*, 17th ed., vol. ii. (Parliamentary), 1895, vol. iii. (Municipal, etc.), 1894; Leigh and Le Marchant, *Law of Elections*, 4th ed., 1885; Mattinson and Macaskie, *Law relating to Corrupt and Illegal Practices*, 3rd ed., 1892.]

Corruption of Blood.—Under the old law attainder for treason or felony involved the corruption of the blood of the person

attainted; that is, he was rendered incapable of inheriting lands from his ancestors, of retaining those he was in possession of, or of transmitting them to any heir; further, no one could claim through him. Where the attainer was for treason his lands escheated to the king, and where it was for felony, to the lord, subject to the king's year and day. This barbarous relic of mediæval times was finally abolished by the Forfeiture Act, 1870.

Corvée.—See EGYPT; STATUTE LABOUR.

Cost-book Companies.—See MINES.

Cost, Freight, and Insurance.—See C. F. I.

Costs.

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The scope of the article is set forth generally in the preliminary Table of Contents.

Costs in bankruptcy have been already dealt with in vol. i. at p. 518, under BANKRUPTCY. Questions relating to security for costs will be discussed hereafter under SECURITY FOR COSTS. Questions as to the various scales on which costs may be taxed will be dealt with under TAXATION.

In this article the word "costs" is (except as regards criminal proceedings, where some modification of the proposition is necessary) restricted to what is indeed its proper meaning, namely, such sum of money as the Court or a judge orders one litigant to pay to another to compensate the latter for the expense to which he has been put by the litigation. The sum so awarded seldom, if ever, fully recoups the successful party for the expense which he has incurred. On interlocutory applications, the Court may direct payment of a lump sum (Order 65, r. 23), and this rule is often acted on in chambers in the Chancery Division. But in all other cases when the Court awards costs it almost invariably directs that they be taxed; and a taxing-master very rarely allows the full amount which the successful party has to pay to his own solicitor. The amount allowed on taxation is called "taxed costs"; and this, as a rule, is all that the unsuccessful party has to pay to his opponent.

The difference between "taxed costs" and the amount which the successful party is liable to pay to his own solicitor, is known as "extra costs"; and this the successful party must pay out of his own pocket. Sometimes, however, the Court or judge orders that the costs payable by one party to another should be taxed "as between solicitor and client"; and then the taxation is conducted on a far more liberal scale. But it often happens that even after a taxation of this kind the successful party is still called on to pay some portion of his solicitor's bill, *e.g.* if any item of expense has been unnecessarily incurred.

The rules relating to costs in Courts of equity have, from the earliest times, been materially different from those which prevailed in Courts of common law; though, in both, the same general principle has been observed that the successful party was entitled to be recouped for all expenses necessarily incurred by reason of the litigation. The Court of Chancery assumed from its commencement the power to deal with all questions of costs, without the aid of the Legislature. Hence, the costs of a Chancery suit have always been in the discretion of the judge who tried the case; though he was bound, of course, to exercise his discretion judicially. But, in any Court of common law, the right to costs is, and always has been, entirely the creature of statute. The old general enactments as to costs are repealed as being inconsistent with the general discretion as to costs given by the Judicature Acts and Rules, though enactments which deal with any special right to costs possessed by a particular class of persons remain unaffected (*Garnett v. Bradley*, 1878, 3 App. Cas. 944; *Rockett v. Clippingdale*, [1891] 2 Q. B. 293; Judicature Act, 1890, 53 & 54 Vict. c. 44, s. 5). Again, there were formerly Acts entitling parties in certain cases to double, or even treble, costs. All of such Acts which were passed prior to 1842 were repealed in that year by the 5 & 6 Vict. c. 97, ss. 1, 2. But several such Acts have been passed since 1842; and these remain in force (*Hasker v. Wood*, 1885, 54 L. J. Q. B. 419). The Court of Chancery could always award costs as between solicitor and client to a successful party; but, in the absence of an express statutory provision to that effect, the Courts of common law had no such power (*Andrews v. Barnes*, 1888, 39 Ch. D. 133; *Mordue v. Palmer*, 1870, L. R. 6 Ch. A. 22, 32).

I. COSTS IN THE CHANCERY DIVISION.

In the Chancery Division no action can be tried with a jury. Hence the one leading rule which governs all questions of costs in this Division is that laid down in Order 65, r. 1, "The costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge." But the rule is subject to this qualification that—

An executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings is not to be deprived of any right to costs out of a particular estate or fund to which he would have been entitled according to the rules acted on in the Chancery Division prior to 24th October 1883. Where the proceedings are taken under some statute which provides how the costs are to be borne, *e.g.* under one of the many statutes enabling public bodies to take land compulsorily for the purposes of their undertaking, the costs of course follow the statutory rule; but where the Act is silent as to costs, the Court has power to deal with them (Judicature Act, 1890, 53 & 54 Vict. c. 44, s. 5; *In re Fisher*, [1894] 1 Ch. 450).

But although costs in the Chancery Division are said to be always

in the discretion of the Court, yet there is one limitation on its power. The judge can give judgment for the plaintiff with costs, or can give him judgment without costs (*i.e.* leave each party to pay his own costs); or he can, under very special circumstances, give judgment for the plaintiff and make him pay all the costs, though of course such cases are very rare (see *Norman v. Johnson*, 1860, 29 Beav. 77; *Wootton v. Wootton*, W. N., 1869, 175). But the Court cannot (where no estate or fund is in litigation) dismiss an action and order the defendant to pay all the costs, though it may order him to pay the costs of some particular portion of the proceedings in which he has been in the wrong, though successful on the main question in the action (see *Dicks v. Yates*, 1881, 18 Ch. D. 76; *In re Foster v. Gt. Western Ry. Co.*, 1882, 8 Q. B. D. 515; *Witt v. Corcoran*, 1876, 2 Ch. D. 69). And though the Court may have no jurisdiction to entertain an application made to it, it still has jurisdiction to dismiss the application with costs (*In re Isaac*, 1838, 4 Myl. & Cr. 11; *In re Bombay Civil Fund Act*, 1882, 1888, 40 Ch. D. 288).

In the absence of any special circumstances, however, a judge of the Chancery Division generally exercises his discretion in such a way as to throw the costs (or at all events all the general costs of the action) on the unsuccessful party. When at the trial costs are given generally, without any reservation, this will include the costs of all accounts and inquiries (*q.v.*) requisite for carrying out the judgment (*Krechl v. Park*, 1875, L. R. 10 Ch. 334).

But it not unfrequently happens that the costs are divided; one party receiving costs up to a particular stage of the proceedings, and the other all costs incurred after that stage was reached. The order as to costs is generally made at the trial; but if the further consideration of the cause be adjourned, the question of costs will often be reserved as well. Or the judge may at the trial give the plaintiff the costs of the action up to judgment, and reserve the subsequent costs. Or on the further consideration of the action, he may give the costs up to the judgment to the plaintiff and the subsequent costs to the defendant. When an inquiry as to damages is directed, it is usual to reserve the costs of the inquiry, so that the Court may retain control over them and see that they are not excessive (*Slack v. Midland Ry. Co.*, 1880, 16 Ch. D. 81).

Where each party is partly successful and partly unsuccessful, and the Court accordingly divides the costs, it may do so in two ways, and there are two distinct forms of order in use in the Chancery Division for this purpose. In one the plaintiff gets the costs of one issue, or of one part of his claim, as the case may be, and the defendant of the other. There is nothing in the terms of the order to show that one is more important than the other, nor has the master any power to discriminate between them. He therefore divides the general costs in moieties, but gives to each party such part of every affidavit or document as relates to that part of the case on which he has succeeded, disallowing the rest. Where, on the other hand, the Court considers either party entitled to more than this, the order gives him "the costs of the action except so far as they have been increased by the unsuccessful issue." This gives him all the general costs, but the master eliminates everything relating to the issue on which he failed (see *Jenkins v. Jackson*, [1891] 1 Ch. 89, and the taxing-master's note in that case, p. 92; *Knight v. Purcell*, W. N., 1879, p. 182; 49 L. J. Ch. 120; *Harley v. Hunt*, W. N., 1887, p. 184; Seton, p. 226, 5th ed.). Where a claim and counter-claim are both dismissed with costs, the plaintiff (in the absence of any special direction) pays the general costs of the action, and the defendant

pays only the additional costs occasioned by the counter-claim (*Saner v. Bilton*, 1879, 11 Ch. D. 416; *Mason v. Brentini*, 1880, 15 Ch. D. 287); and so, where both claim and counter-claim have been successful, the plaintiff will get the general costs of the action, though the result of the litigation as a whole may be in favour of the defendant; but the plaintiff will not recover as costs of the action any costs which are fairly attributable to the counter-claim (*In re Brown*, *Ward v. Morse*, 1883, 23 Ch. D. 377).

Costs which a party is entitled to receive may be deducted or set off against costs which he is liable to pay, and full provision is made by the rules for this purpose (see Order 65, r. 27 (21)).

So, costs which a party is ordered to pay personally may be set off against costs which he is entitled to receive out of a fund in Court (*Datten v. Wedgwood Coal Co.*, 1884, 28 Ch. D. 317). Costs may be set off against money payable by the party to whom the costs are due (*Pringle v. Gloag*, 1879, 10 Ch. D. 676), but not against sums due on an unascertained account (*Whalley v. Ramage*, 1863, 8 L. T. 499). There is no right of set off against costs or money payable in a separate and distinct proceeding (*Ex parte Griffin*, *In re Adams*, 1880, 14 Ch. D. 37; *Hassell v. Stanley*, [1896] 1 Ch. 607). Costs payable in two suits, in which the same estate was being administered, were, however, allowed to be set off (*Lee v. Pain*, 1845, 4 Hare, 255).

A set-off may be allowed notwithstanding the solicitor's lien (Order 65, r. 14); this rule does not, however, apply to costs in distinct and independent proceedings (*Hassell v. Stanley*, [1896] 1 Ch. 607; *Blakey v. Latham*, 1889, 41 Ch. D. 518; *Edwards v. Hope*, 1885, 14 Q. B. D. 922).

If the plaintiff, in an action in the Chancery Division, is suing to enforce a legal right, the judge still has a discretion to deal with the costs, but he will almost invariably exercise it by letting the costs follow the event (*Cooper v. Whittingham*, 1880, 15 Ch. D. 501; *Upmann v. Forester*, 1883, 24 Ch. D. 231; *Walter v. Steinkopff*, [1892] 3 Ch. 489; *American Tobacco Co. v. Guest*, [1892] 1 Ch. 630).

Where there is a fund or estate to be administered, and the case involves a question of construction, on which it is necessary to obtain a decision, the plaintiff will often have his costs out of the fund, even though his contention fails (*Wedgwood v. Adams*, 1844, 8 Beav. 103; *Leighton v. Leighton*, 1874, L. R. 18 Eq. 458; *Butcher v. Pooler*, 1883, 24 Ch. D. 273).

If, during the action, the defendant offers to submit and pay the costs up to that time, the Court will not give the plaintiff the costs subsequently incurred if he persists in bringing the action to trial (*Colburn v. Simms*, 1843, 2 Hare, 543; *Fradella v. Waller*, 1831, 2 Russ. & M. 247); but a defendant who desires to stay his liability to costs must make a "clear, unconditional offer, equivalent to the whole right of the plaintiff at the time" (*Trotter v. Maclean*, 1879, 13 Ch. D. p. 588, per Fry, J.; and see *Nichols v. Evens*, 1883, 22 Ch. D. 611, where the defendant paid money into Court). Similarly, an unconditional offer by the defendant before action of all the relief which the plaintiff ultimately succeeds in obtaining, will often deprive the latter of the costs (*Millington v. Fox*, 1838, 3 Myl. & Cr. 352).

Where a plaintiff claims on the ground of fraud, the judgment or dismissal will almost invariably be with costs (*New Brunswick, etc. Ry. Co. v. Conybeare*, 1862, 9 H. L. 711); and even if he obtains relief and the costs of the action generally, he will be ordered to pay the costs occasioned by charges of fraud which he has failed to substantiate (*London Bank of Australasia v. Lemprière*, 1873, L. R. 4 P. C. 572; *Parker v. McKenna*, 1874,

L. R. 10 Ch. 96). So, if a successful defendant makes groundless charges of fraud (*Wright v. Howard*, 1823, 1 Sim. & St. 190). And, generally, it may be said that where costs are occasioned by the misconduct of either party, that party must bear them, and where, by the misconduct of both parties, neither party will have costs (*Parr v. Lovegrove*, 1858, 4 Jur. N. S. 600, per Kindersley, V.C.).

Again, a plaintiff who raises his case in a needlessly expensive way will be disallowed the extra costs thus occasioned, or may even lose the whole costs of the action; and, indeed, it is a general rule that the costs of unnecessary proceedings must be paid by the party who occasioned them. See, as to disallowing the costs of improper, vexatious, or unnecessary matter in documents or pleadings, Order 65, r. 27 (20); Order 19, rr. 2, 5, and 27; Order 38, r. 3; and costs improperly or needlessly incurred may, in a proper case, be thrown on the solicitor of the party personally (Order 65, r. 11; *Brown v. Burdett*, 1888, 37 Ch. D. 207; 40 Ch. D. 244; *Harbin v. Masterman*, [1896] 1 Ch. 351).

If a person is unnecessarily made a defendant, although he may have an interest in the subject-matter of the action, he will be entitled to his costs from the plaintiff. The rules laid down by Romilly, M. R., in *Ford v. Ford*, 1853, 16 Beav. 516, as to disclaiming defendants still guide the discretion of the judge (see *Day v. Gudgeon*, 1876, 2 Ch. D. 209; *Greene v. Foster*, 1882, 22 Ch. D. 566). It is not "necessary that every defendant shall be interested as to all the relief prayed for" (Order 16, r. 5). But it is vexatious to make a person party to an action merely for the purpose of praying costs against him, and such a proceeding will be strongly discouraged (*Burstall v. Beyfus*, 1884, 26 Ch. D. 35).

Parties representing the same interest if they sever their defences will not, except under special circumstances, be allowed separate sets of costs, but one set only between or amongst them (*Hughes v. Key*, 1855, 20 Beav. p. 397). So in an administration action where any of the persons entitled have assigned or encumbered their shares, the rule is that the assignor and assignee are only entitled to one set of costs, viz. those of the assignors, but the amount of such costs is paid to the assignees (*Greedy v. Lavender*, 1848, 11 Beav. 417); and the same principle is applied in actions for sale in lieu of partition (*Catton v. Banks*, [1893] 2 Ch. 221; *Ancell v. Rolfe*, W. N., 1896, 9; *contra*, *Belcher v. Williams*, 1890, 45 Ch. D. 510).

The costs of motions usually follow the rules laid down by Leach, V.C., in 1823, the effect of which is that the party who succeeds on the motion, and he alone, will have his costs as costs in the action (1 Sim. & St. p. 357).

Where, however, a motion is rendered necessary by the default of the moving party, or he is asking for some indulgence, he will, though successful, have to pay the costs of the application (*Merry v. Nickalls*, 1873, L. R. 8 Ch. 205; *Cooper v. Cooper*, 1876, 2 Ch. D. 492). So, the costs of a motion to commit for contempt will generally be thrown on the guilty party, though such motions, where the contempt is a trumpery one and no committal is really asked for, are not encouraged, and the Court may even make the moving party pay them (*Plating Co. v. Farquharson*, 1881, 17 Ch. D. 49). Where the costs of a motion are reserved until the trial or further order they should be provided for by the judgment or subsequent order; though if the action is ultimately dismissed with costs, this will include all costs reserved (*Hodges v. Hodges*, 1876, 25 W. R. 162; *Memorandum*, W. N., 1876, 271); and also the costs of a motion by the plaintiff which was adjourned or ordered to stand to the trial and was then not brought on

(*Gosnell v. Bishop*, 1888, 38 Ch. D. 385). As to the costs of the necessary proceedings in chambers for working out the judgment of the Court, see Order 55, r. 58; Order 65, r. 27 (12), (13), (16), (23), (24); *Sharp v. Lush*, 1879, 10 Ch. D. 468; *Day v. Batty*, 1882, 21 Ch. D. 830; *In re Knight*, 1887, 57 L. T. 238.

The judge may order the costs which he awards to be taxed in any one of three ways—

1. As between party and party; 2. as between solicitor and client; or 3. as between solicitor and client, but with the addition of charges and expenses properly incurred, but which strictly are not costs of suit.

1. *Costs as between Party and Party*.—Whenever a judge simply directs that costs be taxed without any further direction, they will be taxed as between party and party; although it may be that the party to whom the costs are awarded would, according to the ordinary practice of the Court, be entitled to his costs as between solicitor and client, or to his costs, charges, and expenses. Such a party must take care that the proper direction is expressly inserted in the judgment or order; if it is not, the taxation will be the ordinary one between party and party.

The general principle of such a taxation is that the successful party shall receive only such costs as were necessary to enable him to conduct the litigation. Charges incurred merely for conducting it more conveniently are deemed "luxuries," and must be paid by the party incurring them (*Smith v. Buller*, 1875, L. R. 19 Eq. 473). Thus the costs of employing a third counsel (*Smith v. Buller*, *supra*; *Pearce v. Lindsay*, 1860, 1 De G., F. & J. 573), or the payment of a special retainer (*Green v. Briggs*, 1849, 7 Hare, 279; *Smith v. Earl of Effingham*, 1847, 10 Beav. 378), or the cost of drawings of exhibits affixed to the margin of briefs (*Smith v. Buller*, *supra*), will not be allowed except under very special circumstances.

2. *Costs as between Solicitor and Client*.—When, on the other hand, costs are directed to be taxed as between solicitor and client, a much more liberal allowance will be made, and the party in whose favour such an order is made will be entitled to receive all such costs as a solicitor would reasonably incur in the ordinary conduct of his client's case. The order does not necessarily mean, however, that all costs which the solicitor is entitled to against his client are to be allowed, but the allowance will vary according to the circumstances of the case, regard being had to the position of the parties and the fund out of which the costs are to be paid. Sometimes the words "and consequent thereon," or "and relating thereto," or both sets of words, are added after the words "as between solicitor and client," the effect being to give a wider range to the taxation. Where the costs are to be paid out of the party's own fund, all the above words may properly be inserted, and in acting upon them the taxing-master will use his discretion according to the circumstances as to the extent of the allowance (Seton, p. 221, 5th ed.).

An order for taxation as between solicitor and client is seldom made between hostile litigants, and, indeed, it was formerly doubted how far the Court had power to make such an order where there was no fund or estate to be administered and no fiduciary relation between the parties. It has since been held, however, that there is jurisdiction to order payment of the whole costs of the action as between solicitor and client, though the power is rarely exercised (*Andrews v. Barnes*, 1888, 39 Ch. D. 133). The costs of particular proceedings in an action, however, e.g. costs occasioned by the introduction of scandalous matter, are not unfrequently ordered to be paid as between solicitor and client, to mark the Court's disapproval of such

practices. And in proceedings for administration, or for the determination of some question of construction arising on a deed or will (now usually disposed of on an originating summons), costs as between solicitor and client are generally allowed out of the estate to the following persons:—(1) trustees, executors, and administrators; (2) the plaintiff in a creditor's action when the estate is insolvent; (3) the plaintiff in a legatee's action when the estate proves insufficient to pay the legacies in full. The costs of such proceedings, too, are by consent often allowed to all parties as between solicitor and client out of the estate. If the proper parties have been served, the Court has the same jurisdiction over the costs in these cases as in an administration action commenced by writ (*In re Medland*, 1889, 41 Ch. D. 476).

3. *Costs, Charges, and Expenses*.—In addition to their costs as between solicitor and client, trustees, executors, and administrators are usually allowed all other costs, charges, and expenses properly incurred by them in the execution of the trust or the administration of the estate.

The charges and expenses of trustees are not "costs incident to proceedings in the Supreme Court," and are not therefore within the provisions of Order 65, r. 1, and consequently not in the discretion of the Court in the ordinary sense of the term. Of course, the Court *may* deprive a trustee of his costs, charges, and expenses, but such an order is only made under very special circumstances, and when the trustee has been guilty of serious misconduct (*In re Chennell*, *Jones v. Chennell*, 1878, 8 Ch. D. 492; *Turner v. Hancock*, 1882, 20 Ch. D. 303; *In re Beddoe*, [1893] 1 Ch. 547).

Similarly, a mortgagee is entitled to all costs, charges, and expenses properly incurred by him in relation to the mortgage, and, if not paid, he adds them to his security. It is, in fact, part of the contract between a trustee and his *cestui-que trust*, and between mortgagor and mortgagee, that the trustee or mortgagee shall be allowed all proper costs, charges, and expenses connected with the trust or mortgage; and neither can be deprived of this right, except for serious misconduct (*Cotterell v. Stratton*, 1872, L. R. 8 Ch. 295; *Turner v. Hancock*, *supra*). In a priority suit between incumbrancers, the general rule is that the costs follow the mortgages, unless the Court in its discretion otherwise orders (*Harpham v. Shacklock*, 1881, 19 Ch. D. p. 215, per Jessel, M. R.).

[*Authorities*.—Morgan and Wurtzburg on *Costs in Chancery*, 1882; Shaen and Greville, *Chancery Costs*, 1876; Johnson on *Bills of Costs*, 1897; *Annual Practice*.]

II. COSTS IN THE QUEEN'S BENCH DIVISION.

The right to costs in any action in the Queen's Bench Division is governed by two considerations—1. Was the action tried by a judge with a jury, or by a judge alone? 2. Was the action of such a kind that it could have been tried in the County Court?

1. If the action be tried by a judge alone, he has full discretion to dispose of the costs; the rules which govern the discretion of a judge of the Chancery Division (*ante*, pp. 470 *et seq.*) will guide him in his decision; and, in theory at all events, he must in each case make an order disposing of them. But if the action be tried by a judge with a jury, then, by the express provision of Order 65, r. 1, "the costs shall follow the event, unless the judge by whom such action is tried shall for good cause otherwise order." Hence in such a case, if a plaintiff has obtained a verdict, even for nominal damages, he need not ask for costs; if nothing is said about costs, the plaintiff will receive them. It is for the defendant's counsel to apply to the

judge as soon as the verdict is given, for an order depriving the plaintiff of his costs. As a rule, such an order will only be made where "contemptuous" damages, such as a farthing or a shilling, have been given, and not always then. There must be some "good cause," beside the smallness of the damages, to give the judge jurisdiction to make such an order; something either in the conduct of the parties or in the facts of the case which, in spite of the finding of the jury, makes it more just that the costs should not follow the event (*Jones v. Curling*, 1884, 13 Q. B. D. 262; *Huxley v. West London Extension Ry. Co.*, 1889, 14 App. Cas. 26).

Already, however, there are two exceptions to these general rules—

(i.) By sec. 1 of the Slander of Women Act, 1891, 54 & 55 Vict. c. 51, in any action for words spoken and made actionable by that Act, "a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action." Hence, in this case it is necessary for the plaintiff's counsel to ask for a certificate, unless the verdict is so large that it clearly exceeds the amount at which the costs of the action will be taxed.

(ii.) By sec. 1 (b) of the Public Authorities Protection Act 1893, 56 & 57 Vict. c. 61, it is provided that "where any action is commenced against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, and judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." These words are imperative, and seem to deprive the judge of all power over costs, even where he tries the case without a jury. See 102 *L. T. Jo.*, 1897, p. 395.

If the judge thinks fit to make an order, that order is not necessarily that each party should pay his own costs. He may for very good cause order that the successful plaintiff shall pay the defendant's costs, as well as his own (per Bramwell, L.J., 15 Ch. D. at p. 41; and see *Myers v. The Financial News*, 1888, 5 T. L. R. 42); and where there has been a non-suit, and a new trial, the judge who tries the case the second time may order that the successful plaintiff shall pay the whole costs of both trials (*Harris v. Petherick*, 1879, 4 Q. B. D. 611). But of course such an order would only be made in an extreme case, and where the plaintiff has grossly misconducted himself (see *Norman v. Johnson*, 1860, 29 Beav. 77). A successful defendant may also for good cause be deprived of his costs (*Sutcliffe v. Smith*, 1886, 2 T. L. R. 881). But he cannot be made to pay the whole costs of the action under any circumstances (*Dicks v. Yates*, 1881, 18 Ch. D. 76, 85; *In re Foster v. Great Western Ry. Co.*, 1882, 8 Q. B. D. at pp. 521, 522).

So, too, if the judge makes an order under Order 65, r. 1, he is not bound to deal with the whole costs of the action. He may for good cause deprive a successful party of a portion of his costs. Thus the judge may order a successful plaintiff to pay the costs occasioned by a claim for special damage which he has failed to substantiate (*Forster v. Farquhar*, [1893] 1 Q. B. 564). So if the plaintiff insists on laying the venue at a place which is not the natural or most convenient place for the trial, he may be ordered to pay the additional costs occasioned by the action being tried in that place (*Roberts v. Jones*, [1891] 2 Q. B. 194; *Hill v. Morris*, 1891, 8 T. L. R. 55).

Order 65, r. 1, also confers on "the Court" an original and independent jurisdiction for good cause to deprive a successful plaintiff of his costs. This means a Divisional Court, not the Court of Appeal (*Myers v. Defries*, 1879, 4 Ex. D. 176; *Bowey v. Bell*, 1878, 4 Q. B. D. 95). But, as a rule, the

Court declines to exercise this jurisdiction, and on the following grounds:— If an application was made to the judge at the trial, then the appeal, if any, lies to the Court of Appeal. If no application was made to the judge at the trial, then the defendant must satisfactorily explain the omission, which it is generally impossible to do. There is, however, authority for holding that such an application may be made to the Divisional Court on fresh materials which were not in the possession of the defendant or the judge at the trial (per Bramwell, L.J., 4 Ex. D. at pp. 180, 181). But such an application must be made promptly (*Kynaston v. Mackinder*, 1877, 47 L. J. Q. B. 76; 37 L. T. 390; *Bowey v. Bell*, *supra*).

If the judge at the trial declines to make an order as to costs, there is no appeal from his decision (*Moore v. Gill*, 1888, 4 T. L. R. 738). But if he decides to make an order as to costs, then there is an appeal to the Court of Appeal on the question whether any "good cause" existed upon which the judge could exercise his discretion. If there was no "good cause," the judge had no jurisdiction to make any order as to costs, and the Court of Appeal will set the order aside. If there was anything which could amount to "good cause" then the Court of Appeal will not interfere with the judge's discretion, even though they do not approve of the way in which he has exercised it (*Jones v. Curling*; *Huxley v. West London Extension Rwy. Co.*, *supra*).

"Good Cause."—There has been some difference of opinion among our judges as to what constitutes "good cause" under Order 65, r. 1. Not every consideration which may legitimately affect the mind of a judge when he has an absolute discretion over the costs of an action tried before himself alone, will be "good cause" within the meaning of this rule. The two positions are not identical; in the former case, the judge is exercising a discretion, which is undoubtedly vested in him; in the latter case, the existence of "good cause" is a condition precedent to his having any discretion to exercise. At the same time, it is impossible to define strictly what is "good cause" for making an order that costs shall not follow the event. "No nearer and no closer definition can be given than that there will be good cause, whenever it is fair and just as between the parties that such an order should be made" (*per cur.* in *Forster v. Farquhar*, [1893] 1 Q. B. at p. 567). "The facts must show the existence of something, having regard either to the conduct of the parties or to the facts of the case, which makes it more just that an exceptional order should be made than that the case should be left to the ordinary course of taxation" (per Brett, M. R., in *Jones v. Curling*, 1884, 13 Q. B. D. at p. 268). "The mere fact of a plaintiff in an action for libel or slander, recovering only a farthing or a shilling damages, is not of itself good cause for depriving him of costs. 'Good cause' must be something more than the mere smallness of damages. The smallness of the damages, however, is an important element to be considered, if there are any other circumstances which can be taken into account" (per A. L. Smith, L.J., in *O'Connor v. The Star Newspaper Co. Ltd.*, 1893, 68 L. T. at p. 148). "'Good cause' really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make. Now, to ascertain the existence of such facts, the judge should look, in the first place, at the result of the action itself, namely, the verdict of the jury, and he should look also at the conduct of the parties, to see whether either of them had in any way involved the other unnecessarily in the expense of litigation, and beyond that he should consider all the facts of the case so far as no particular fact was concluded

by the finding of the jury" (per Bowen, L.J., in *Jones v. Curling*, 1884, 13 Q. B. D. at p. 272). "Everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of his costs" (per Lord Halsbury, L.C., in *Huxley v. West London Extension Ry. Co.*, 1889, 14 App. Cas. at p. 32). The words "good cause" embrace "everything for which the party is responsible connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense" (per Lord Watson, *ibid.* at p. 33). "First, in determining whether good cause exists, the judge must accept the verdict as conclusive upon all matters of fact necessarily involved in it, however much he may personally dissent from the finding of the jury. So long, however, as the judge does not base his decision upon matter inconsistent with the verdict, all other matters outside the verdict are open for his consideration—everything which led to the action, every circumstance tending to show that the plaintiff was blamable in bringing it, everything reflecting upon the conduct of the parties in the course of the litigation itself (*Harnett v. Vise*, 1880, 5 Ex. D. 307; see per James, L.J., pp. 310, 312); and the judge is under no obligation to give effect to any special reasons or views the jury may have entertained or expressed in giving their verdict—such, for instance, as a hope or recommendation that it may or may not carry costs—unless such views accord with his own; nor is the amount of damages awarded to be taken as a conclusive test upon the question of 'good cause,' though it properly forms an element for consideration." . . . "Should the jury in an action for assault or libel award the plaintiff an ignominious compensation, it would not follow that as of course the judge ought to deprive him of his costs, although he might treat it as an indication of the opinion of the jury, in which he coincided, that the character of the plaintiff was worthless, and that the action never ought to have been brought and was therefore oppressive" (per Hawkins, J., in *Roberts v. Jones and Willey v. Great Northern Ry. Co.*, [1891] 2 Q. B. at pp. 197, 198).

2. If, however, no special order be made as to costs, they follow the event. But the event depends on whether the action was or was not of a kind which could be brought in the County Court. Actions for breach of promise of marriage, libel, slander, and seduction cannot be commenced in the County Court; nor can actions of ejectment, or any other action involving the title to any hereditament, where the value of the property exceeds £50 a year. To all these cases, therefore, sec. 116 of the County Courts Act, 1888, does not apply. Hence, in any such action, a verdict for any amount, however small, will carry costs (*Saywood v. Cross*, 1884, 14 Q. B. D. 53).

But if the action be of a kind which could have been commenced in a County Court, then, if it was founded on contract, and the plaintiff recovers less than £20, he will be entitled to no costs whatever; if he recovers £20 or more, but less than £50, he will be entitled to County Court costs only (County Courts Act, 1888, s. 116); if he recovers exactly £50, he will be entitled to County Court costs only (Order 65, r. 12; *Millington v. Harwood*, [1892] 2 Q. B. 166)—(i.) unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or makes a special order as to costs (see *Neaves v. Spooner*, 1887, 36 W. R. 257; 56 L. T. 164); or (ii.) unless within twenty-one days after service of the writ or such time as may be ordered by the High Court or a judge thereof, the plaintiff obtains an order, under Order 14, empowering him to enter judgment for £20 or more. But if the action

was founded on tort, and the plaintiff recovers less than £10, he will be entitled to no costs whatever; if he recovers £10 or more, but less than £20, he will be entitled to County Court costs only, unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or makes a special order as to costs (s. 116).

Sec. 116 of the County Courts Act, 1888, applies wherever the plaintiff's claim is reduced below the limit by an admitted set-off, as distinct from a counter-claim (*Lovejoy v. Cole*, [1894] 2 Q. B. 861), but not where it is so reduced by a set-off which he does not admit, or by a counter-claim (*Stooke v. Taylor*, 1880, 5 Q. B. D. 569; *Goldhill v. Clark*, 1893, 68 L. T. 414). The section does not apply to any counter-claim; the defendant is always entitled to the costs of his counter-claim if he recovers under it any amount, however small (*Blake v. Appleyard*, 1878, 3 Ex. D. 195; *Lewin v. Trimming*, 1887, 21 Q. B. D. 230). Nor does the section apply as between the defendant and a third party whom he has brought in (per Field, J., in *Bates v. Burchell*, W. N., 1884, 108). But it does apply to an action commenced in an inferior Court, and removed by *certiorari* (*Pellas v. Breslauer*, 1871, L. R. 6 Q. B. 438), and to an action brought in the High Court by a solicitor for his costs (*Blair v. Eisler*, 1888, 21 Q. B. D. 185).

It is not always easy to say whether an action is founded on contract or tort. Thus an action by a passenger against a railway company for personal injuries caused by negligence is an action founded on tort, though he took a ticket (*Taylor v. M. S. and L. Rwy. Co.*, [1895] 1 Q. B. 134; *Kelly v. Metropolitan Rwy. Co.*, *ibid.* 944). An action of detinue is, for this purpose at all events, an action of tort (*Bryant v. Herbert*, 1878, 3 C. P. D. 389; and see *Cohen v. Foster*, 1892, 61 L. J. Q. B. 643). But an action against a common carrier for the value of goods which he had lost was held to be founded on contract (*Fleming v. Metropolitan Rwy. Co.*, 1879, 4 Q. B. D. 81). An action for penalties for infringement of dramatic copyright, under 3 & 4 Will. IV. c. 15, s. 2, is not affected by sec. 116; and the plaintiff is entitled to his full costs under 5 & 6 Vict. c. 97, s. 2 (*Reeve v. Gibson*, [1891] 1 Q. B. 652).

Special Costs.—So far we have dealt with the general costs of the action. But application for any special costs, such as those of a shorthand writer's notes, or of a commission abroad, or of a special jury, or of photographic copies of any document, should be made when judgment is delivered. No order will be made as to such costs after the judgment has been drawn up; they must then be borne by the party who has incurred them (*Ashworth v. Outram*, 1878, 9 Ch. D. 483; *In re St. Nazaire Co.*, 1879, 12 Ch. D. 88; *Executors of Sir Rowland Hill v. Metropolitan District Asylum*, 1880, 49 L. J. Q. B. 668; 43 L. T. 462).

Costs of Separate Issues.—By Order 65, r. 2, "when issues in fact and law are raised upon a claim or counter-claim, the cost of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." And for this purpose the word "event" must be read distributively—that is to say, the party in whose favour final judgment is entered will be entitled to the general costs of the action, but the other party will be entitled to the costs of any issues found for him. The ultimate balance generally proves to be in favour of the party who recovers the general costs of the action.

Payment into Court.—If money be paid into Court, and the plaintiff accepts it in satisfaction of his claim, he must give the defendant notice to that effect, and may then proceed to tax his costs, unless the Court or a judge otherwise orders, and in case of non-payment he may sign judgment

for his costs (Order 22, r. 7). This is so, even where the defendant pays sixpence into Court, and the plaintiff accepts that sum in satisfaction of his claim (*M'Sheffrey v. Lanagan*, 1887, 20 L. R. Ir. 528). But a judge at chambers will deprive the plaintiff of his costs if the whole action was useless or malicious (*Broadhurst v. Willey*, W.N., 1876, p. 21; *Nichols v. Evens*, 1883, 22 Ch. D. 611). If the plaintiff does not accept the sum paid into Court, but continues his action for damages *ultra*, he will recover the whole of his costs of the action should the jury find a verdict for an amount larger than the sum paid into Court. If, on the other hand, the verdict be for an amount not greater than the sum in Court, the defendant will be entitled to the whole costs of the action (*Langridge v. Campbell*, 1877, 2 Ex. D. 281; *Goutard v. Carr*, 1884, 13 Q. B. D. 598, *n.*); unless the Court or a judge think fit to make a special order that the plaintiff shall have his costs of the action up to the time when the money was paid into Court, and the defendant shall have only his costs incurred after that time, as in *Buckton v. Higgs*, 1879, 4 Ex. D. 174; and in *Best v. Osborne*, 1896, 12 T. L. R. 419.

Counter-claim.—The presence of a counter-claim always complicates the question of costs. In the first place, the distinction between a set-off and a counter-claim must not be overlooked. A set-off is a defence to the plaintiff's action, but a counter-claim is practically a cross-action brought by the defendant against the plaintiff. Moreover, there can be no set-off where the damages claimed are unliquidated. See further, DEFENCE AND COUNTER-CLAIM and SET-OFF. Sec. 116 of the County Courts Act, 1888, does not, as we have seen, apply to counter-claims of any kind. It may, however, apply to the plaintiff's claim; if it does, his right to costs is subject to the provisions set out on p. 477, *ante*; while the defendant will be entitled to recover all the costs of his counter-claim, if he recover only a farthing thereunder, unless a special order be made to the contrary (*Staples v. Young*, 1877, 2 Ex. D. 324; *Chatfield v. Sedgwick*, 1879, 4 C. P. D. 459; *Rutherford v. Wilkie*, 1879, 41 L. T. 435; *Ahrbecker & Son v. Frost*, 1886, 17 Q. B. D. 606). But if the plaintiff's claim was of a kind that could not be brought in the County Court, and the defendant has recovered anything on his counter-claim, then, as Brett, L.J., says in *Baines v. Bromley*, 1881, 6 Q. B. D. at p. 995, "the proper principle of taxation, if not otherwise ordered, is to take the claim as if it and its issues were an action, and then to take the counter-claim and its issues as if it were an action, and then to give the allocatur (*q.v.*) for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case, where items are common to both actions, the master would divide them." This was also recognised as the proper principle in *In re Brown, Ward v. Morse*, 1883, 23 Ch. D. 377; in *Lowe v. Holme*, 1883, 10 Q. B. D. 286; in *Shrapnel v. Laing*, 1887, 20 Q. B. D. 334; in *Amon v. Bobbett*, 1889, 22 Q. B. D. 543; and in *Westacott v. Bevan*, [1891] 1 Q. B. 774. If the plaintiff recover any sum at all, even a farthing, and the defendant nothing on his counter-claim, then the plaintiff, in the absence of any special order to the contrary, is entitled to the whole costs of the action (*Potter v. Chambers*, 1879, 4 C. P. D. 457). If neither plaintiff nor defendant recover anything on either claim or counter-claim, the plaintiff pays the general costs of the action, including those common to both claim and counter-claim, for he commenced the litigation; the defendant pays only such costs as the plaintiff can prove to have been occasioned by the counter-claim (*Saner v. Bilton*, 1879, 11 Ch. D. 416; *Mason v. Brentini*, 1880, 15 Ch. D. 287).

Costs of a Reference.—Every arbitrator has now full power over the

costs of the reference and award, unless a contrary intention be expressed in the submission (sec. 2 of the Arbitration Act, 1889). He may direct to, and by whom, and in what manner those costs, or any part thereof, shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client (Schedule I to that Act, clause (i.)). An official referee, acting under any order of the Court, has, subject to any directions in the order, the same discretion as to costs as the Court or a judge could have exercised (Order 36, r. 55 b), and there is no appeal from the exercise of his discretion (*Arbib v. Henry*, 1895, 99 L. T. J. 283).

Husband and Wife.—If a married woman, having general separate estate, fails in an action, she may be condemned in costs, although her husband was joined with her as a co-plaintiff or a co-defendant (*Newton and Wife v. Boodle*, 1847, 4 C. B. 359; 18 L. J. C. P. 73; *Morris v. Freeman and Wife*, 1878, 3 P. D. 65; and see the remarks of Jessel, M. R., in *Besant v. Wood*, 1879, 12 Ch. D. 630; and ss. 1 and 13 of the Married Women's Property Act, 1882). And now the Court may order payment of such costs out of separate property, which is subject to a restraint on anticipation (sec. 2 of the Married Women's Property Act, 1893).

3. *Costs on the Crown Side of the Queen's Bench Division*.—Proceedings on the Crown side of the Queen's Bench Division may be either civil or criminal. By the rules of the Supreme Court of 1880 (Order 68, r. 2), and, again, by the Crown Office Rules of 1886, r. 300, the provisions of Order 65 as to costs were made to apply to all civil proceedings on the Crown side. Hence one would have supposed the costs of these proceedings were now in the discretion of the Court, and it was so held by a Divisional Court (Field and Manisty, J.J., in *Clark v. Fisherton-Angar*, 1880, 6 Q. B. D. 139). But the Court of Appeal has since, apparently, held the contrary (*London County Council v. West Ham*, [1892] 2 Q. B. 173; but note that in that case *Clark v. Fisherton-Angar* was not cited to the Court). Proceedings in *quo warranto* are now deemed to be civil proceedings (Judicature Act, 1884, s. 15). Nothing in the Judicature Act of 1890 is (by s. 4) to alter the practice in proceedings on the Crown side of the Queen's Bench Division, whether civil or criminal. But a curious distinction has now been made between proceedings on that side, which, from their nature, might formerly have been brought in other Courts besides the Queen's Bench (such as *habeas corpus* and prohibition), and those which, like *certiorari*, could only have been taken in the Queen's Bench. If proceedings be taken in *habeas corpus* or prohibition on the Crown side of the Queen's Bench Division, it is said that the Court has jurisdiction to award costs, because the proceedings might have been taken in some other Court, and that other Court would have had power to award costs; but where the proceedings can only be brought on the Crown side, there is no general power to award costs (*R. v. JJ. of London*, [1894] 1 Q. B. 453; *R. v. Jones*, [1894] 2 Q. B. 382). This does not seem very satisfactory. But there are special Crown Office rules dealing with costs in *mandamus* (rr. 63, 77, 78), *quo warranto* (r. 56), attachment for contempt (r. 274), and criminal information (rr. 49, 50).

4. *Costs at Judges' Chambers*.—A master or district registrar has full power to deal with the costs of any application made to him; but not, as a rule, to dispose of the whole costs of the action. 'He may make the costs of, and incidental to, his order "costs in the cause," which will mean that whoever loses the action will have to pay the costs of both sides. If, however, the master orders the costs to be "defendant's costs in the cause," the plaintiff, even if ultimately successful, will not be paid his costs of that

summons; if he fails in the action, he must pay both the defendant's costs and his own. If the Master orders the costs to be "defendant's costs in any event," the plaintiff will have to pay the costs of both sides, whatever the result of the action; but not at once; they will be taken into account in the ultimate taxation. It is only where a summons is dismissed "with costs," that the successful party is entitled to an immediate taxation. An appeal lies from the decision of a Master or district registrar, even where it only affects costs (*Foster v. Edwards*, 1879, 48 L. J. Q. B. 767). But if there is no appeal from his order at the time, the judge at the trial has no power to vary it (cp. *Koosen v. Rose*, 1897, 76 L. T. 145).

[*Authorities*.—*Annual Practice*; Johnson on *Bills of Costs*, 1897; Gordon on *Costs*, 1884; Short, *Taxation of Costs in the Crown Office*; Archibald and Vizard, *Practice at Judges' Chambers*.]

III. COSTS IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE.—Order 65, r. 1, of the R. S. C., provides that, "subject to the provisions of the (Judicature) Act and these Rules, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court, provided that where any action or issue is tried by a jury the costs shall follow the event, unless the judge by whom such action or issue is tried or the Court shall for good cause otherwise order." The Judicature Act, 1875, makes all rules and orders of Court in force at the time of the commencement of this Act in the Court of Probate . . . remain and be in force in the High Court and Court of Appeal (s. 18); and saves the existing procedure of Courts whose jurisdiction is transferred to the High Court which is not inconsistent with the Judicature Acts and Rules (s. 21). The effect of these enactments is to preserve the old Rules of practice, subject to the Rules of the Supreme Court (just as the Rules of practice followed in the Prerogative Court were preserved under the Probate Act of 1857 (s. 29), so far as not inconsistent with the Probate Court Rules of 1862); and for the purposes of arrangement it is best to consider the subject of costs in testamentary suits first (1) generally; and then with reference to particular persons, namely, (2) executors, (3) next-of-kin and other parties, (4) interveners.

(1) *Generally*.—The successful party in a probate suit generally obtains his costs out of the estate or against the other party, e.g. executor or person *loco executoris* proving and making good a will, or a next-of-kin or an executor or legatee of a former will successfully contesting a will (*Critchell v. Critchell*, 1863, 3 Sw. & Tr. 41; *Archer v. Burke*, 1868, L. R. 1 P. & D. 558). If the losing party is cast in costs and cannot pay them, the other party, if he takes probate of the former will or letters of administration with the will annexed, or administers the estate of the deceased, may take them out of the estate as part of the expenses of obtaining probate or administration; but unless he does so, he loses his claim to costs against the estate (*Nash v. Yelloly*, 1862, 2 Sw. & Tr. 59).

The occasions on which the Prerogative Court gave costs to an unsuccessful party out of the estate are thus summarised in Tristram and Coote, *Probate Practice*: (a) when the party was led into the contest, whether he were plaintiff or defendant, by the state of the deceased's papers (*Hillam v. Walker*, 1828, 1 Hag. Con. 75; *Abbott v. Peters*, 1833, 4 Hag. Con. 381); (b) where the validity of a will depended on a doubtful point of law (*Burke v. Kent*, 1840, 3 Moo. P. C. 334; *Robins v. Dolphin*, 1860, 1 Sw. & Tr. 518); (c) where there was reasonable doubt as to the testator's testamentary capacity at the time of the execution of the will (*Frere v. Peacock*, 1846, 1 Rob. 456).

Waring v. Waring, 1847, 5 N. C. 324; *Borlase v. Borlase*, 1845, 4 *ibid.* 140), (d) where the party chiefly benefited by the will opposed had acted improperly and so as to induce a suspicion of fraud and undue influence (*Browning v. Budd*, 1848, 6 Moo. P. C. 430); (e) where the circumstances were peculiar and required investigation (*Jones v. Godrich*, 1844, 5 Moo. P. C. 16; *Coventry v. Williams*, 1844, 3 N. C. 172; *Symons v. Tozer*, *ibid.* 55; *Gregory v. H.M.'s Proctor*, 1845, 4 *ibid.* 273).

On the other hand, the unsuccessful party in a suit forfeited his claim to costs out of the estate—(a) where he tried to set up fraud or conspiracy not borne out by evidence (*Barry v. Bullin*, 1838, 2 Moo. P. C. 492), though, if there were suspicious circumstances in the conduct of the person propounding the will, no costs were given (*Broadbent v. Hughes*, 1860, 29 L. J. P. & M. 134); (b) where by inquiry he could have cleared up before the suit circumstances *prima facie* suspicious (*Nichols v. Binns*, 1858, 1 Sw. & Tr. 239); (c) when from circumstances disclosed in the course of the case he should have judged that he ought not to persevere in it (*Dean v. Russell*, 1820, 3 Phillim. 334, nude executor condemned in costs).

All these rules are recognised as valid in the Probate Division as they were in the Probate Court, e.g. "where a charge of undue influence is made and not established, those who make it must pay the costs" (*Black v. Cleland*, 1895, 11 T. L. R. 63, Barnes, J.). Where a will made in favour of the testator's widow and at her instigation was upheld, and charges of undue influence and incapacity were dismissed, no order was made as to costs (*Smith v. Smith*, 1866, L. R. 1 P. & D. 239).

A concise statement of the practice governing the costs of an unsuccessful party in probate actions is to be found in two general rules laid down by Lord Penzance (*Mitchell v. Gard*, 1863, 3 Sw. & Tr. 275)—(1) "If the cause of the litigation takes its origin in the fault of the testator or those interested in the residue, the costs properly come out of the estate." Thus a next-of-kin denied access to testatrix in her last illness, during which she made a will in favour of two strangers in blood, as she had previously said she would do, was given his costs of unsuccessfully opposing the will (*Goodacre v. Smith*, 1867, L. R. 1 P. & D. 359); an executor has been given his costs, being held to be justified in not thinking that eccentricity in his testator amounted to insanity, as found by the jury (*Boughton v. Knight*, 1873, L. R. 3 P. & D. 77); and a next-of-kin, who had taken out administration upon the residuary legatee of the will not answering an application whether there was a will or not, was held entitled, when the will was produced some months after and proved in solemn form, not only to costs, but also to costs of taking out administration (*Smith v. Smith*, 1865, 4 Sw. & Tr. 3); and the costs of an unsuccessful opposition to a will have been allowed where there had been misconduct on the part of those setting it up (*Williams v. Henery*, 1864, 3 Sw. & Tr. 471). Costs have also been allowed to an unsuccessful party where the will was prepared by a principal beneficiary, and there was no disinterested evidence that the testator approved of it (*Keating v. Barks*, 1845, 4 N. C. 273; and see *Orton v. Smith*, 1873, L. R. 3 P. D. 23; *Davies v. Gregory*, *ibid.* 28; *Jenner v. Finch*, 1879, 5 P. D. 106; *Brown v. Penn*, 1895, 12 T. L. R. 46). (2) "If there be reasonable cause, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent." Such "reasonable cause" has been afforded by the

attesting witnesses to the will giving different evidence as to its execution (*Ferrey v. King*, 1861, 3 Sw. & Tr. 51); the fact that a verdict in a common law action on the issues raised by the will might have been equally well found for or against the will (*Bramley v. Bramley*, 1864, *ibid.* 430); the evidence of a doctor (who was an attesting witness) that when the will was read over the testator only made a gesture, and he could not swear that the testator was of sound mind (*Tippett v. Tippett*, 1865, L. R. 1 P. & D. 54); the widow of the testator refusing to give information as to her marriage with him, which was the question in the case (*Wiseman v. Wiseman*, 1866, *ibid.* 351).

The costs may, however, be left to follow the event of the action tried by a jury under Order 65, r. 1 (*Black v. Cleland*, 1895, 11 T. L. R. 63); and the law has been recently stated thus: "Under the Judicature Act the practice was for costs to follow the event, unless good cause was shown to the contrary. The general practice in this Court was that if the testator, by reason of his conduct, was the cause of the litigation, the costs should come out of the estate. Another rule which the Court acted on was, that if the facts show that neither the testator nor any persons interested under the will were to blame, then there should be no order as to costs, *i.e.* each side to pay their own" (Barnes, J., *Browning v. Mostyn*, 1897, 13 T. L. R. 184).

As a general rule, every unsuccessful party in a probate suit (subject to the exceptions given below) is personally liable to costs, payment of which may be enforced by writ of *elegit* (*Heath v. Heath*, 1874, 29 L. T. 931), or sequestration (*Bayley v. Bayley*, 1859, 4 Sw. & Tr. 222, Order 43, rr. 6, 7), *e.g.* an executor (*Cottrell v. Cottrell*, 1872, L. R. 2 P. & D. 397), an infant (*Vivian v. Kennelly*, 1890, 63 L. T. 778), a next-of-kin or heir-at-law (*Fyson v. Westrope*, 1858, 1 Sw. & Tr. 279), a legatee (*Urquhart v. Fricker*, 1826, 3 Add. 57), a married woman with separate estate (*Morris v. Freeman*, 1878, 3 P. & D. 65), even though subject to restraint on anticipation, provided in this case that she "institutes a cause" within the Married Women's Property Act, 1893, but a married woman entering a caveat against probate of a will by the executor propounding it is not within these words (*Moran v. Placc*, [1896] Prob. 214 C. A.); a person suing *in forma pauperis*, though this was a matter for the discretion of the Court (*Lemann v. Bonsall*, 1823, 1 Add. 389; *Wayner v. Mears*, 1829, 2 Hag. Con. 524; *Reid v. Davies*, 1833, 4 *ibid.* 394; *Carless v. Thompson*, 1858, 1 Sw. & Tr. 21); but the Queen's Proctor opposing a will, though he withdraws his opposition early in the trial, cannot be condemned in costs (*Atkinson v. H.M.'s Proctor*, 1871, L. R. 2 P. & D. 255). Where the official solicitor was appointed guardian *ad litem* for an infant defendant, his costs were made part of the costs of the executor propounding the will (*White v. Duvernay*, [1891] Prob. 290). Condemnation in costs includes the costs of an administrator *pendente lite* (*Fisher v. Fisher*, 1878, 4 P. D. 231); and if an appeal is brought, his costs till the dismissal of the appeal (*Taylor v. Taylor*, 1881, 6 P. D. 29). The Probate Court had no jurisdiction to order costs to be paid out of realty (*Young v. Dendy*, 1867, L. R. 1 P. & D. 347), though this can be done by consent of parties (*Smith v. Hopkinson*, 1878, 4 P. D. 84). Whether the Probate Division can order payment of costs out of the rents of realty in the hands of a receiver appointed under the Probate Court Act, 1857, s. 71, was not decided in a case before the Appeal Court (*In re Morgan*, 1890, W. N. 125); but in a recent Chancery case it has been held that it cannot do so (*Bridges v. Shaw*, [1894] 3 Ch. 615, Kekewich, J.); and in both these cases an order by the Probate Division for "costs to be paid out of

the estate" was held to apply to personalty only. As to SECURITY FOR COSTS and TAXATION and SOLICITORS' LIEN, see these headings.

(2) *Executors*.—As a general rule, an executor propounding a will in solemn form, whether he does so of his own motion, or because he is put on proof by interested parties, is entitled to take his costs out of the deceased's estate. A residuary or other legatee proving a will in solemn form, and thereby "fulfilling the duty of the executor," and getting it pronounced for, may have his costs out of the estate (*Sutton v. Drax*, 1815, 2 Phillim. 323; *Williams v. Goude*, 1828, 1 Hag. Con. 610; *Thorne v. Rooke*, 1841, 2 Curt. 831), but cannot, like the executor, take them *ex officio*, unless he is administrator *cum testamento annexo*; for if the executor cannot, or will not, take probate, a residuary legatee is entitled to take out letters of administration with the will annexed in priority to a legatee propounding the will (*Bewsher v. Williams*, 1861, 3 Sw. & Tr. 62); and the latter can only get his costs in such a case by the Court including them in its decree in favour of the will, or ordering them to be so paid (*ibid.*). A legatee propounding and establishing a will is entitled to the same costs as an executor under the like circumstances, and a legatee, establishing a codicil to a will in opposition to the executor propounding the will only, was given party and party costs against him as well as a sum *nomine expensarum* to cover his extra costs (*Wilkinson v. Corfield*, 1881, L. R. 6 P. D. 27, following *Sutton v. Drax*, above). Executors have been given the costs of a first successful trial out of the estate, where a new trial was granted to a son of the testator (who had opposed the will) on the ground of the verdict being against the weight of evidence, but he discontinued the action, and his sisters, who had appeared in the former proceedings, but had not pleaded, were allowed to continue it (*Boulton v. Boulton*, 1867, L. R. 1 P. & D. 456). A legatee (to a small amount) acting in the interest of an infant legatee, and establishing a will which the executor refused to propound, has been given her costs out of the estate (*Bewsher v. Williams*, 1861, 3 Sw. & Tr. 62); as also has been an executor propounding a will, though it turned out to be invalid, on behalf of an infant legatee (*Davies v. Rees*, 1863, 13 L. T. 609).

On the other hand, executors and persons *loco executoris*, who fail in establishing the will they set up, in certain circumstances are liable to be refused their costs out of the estate, and to be condemned in the costs of the opposing party, or be left to bear their own costs. Thus an executor has been condemned in costs where probate was refused to the will set up by him, under which he was the chief beneficiary, and there were suspicions of fraud (*Saph v. Atkinson*, 1822, 1 Add. 162; *Dodge v. Meech*, 1828, 1 Hag. Con. 612), or where probate was refused to a will (testatrix being wife to the executor) on the ground of its having been obtained by undue influence (*Marsh v. Tyrrell*, 2 Hag. Con. 141; *Baker v. Batt*, 1836, 1 Curt. 172). Where a will was established all but the residuary clause, which was found to have been obtained by undue influence of the executrix, she was only given the costs of proving the will in solemn form (*Smith v. Atkins*, 1870, L. R. 2 P. & D. 168). A nude executor, *i.e.* one without any interest under the will, and propounding it without cause and unsuccessfully, may be condemned in costs, and should therefore take security for them from the person interested (*Rennie v. Massie*, 1866, L. R. 1 P. & D. 118); and an executrix losing a will through carelessness, and proving a draft of it in solemn form, was only allowed the costs which would have been incidental to proof of the original in solemn form, and had to pay the defendant's costs (*Burls v. Burls*, 1868, L. R. 1 P. & D. 472); and for other instances of executors

being condemned in costs, see *Rayson v. Parton*, 1869, L. R. 2 P. & D. 38; *Richards v. Humphreys*, 1860, 29 L. J. P. & M. 137; *Goss v. Hill*, 1871, 40 *ibid.* 39).

(3) *Next-of-Kin and other Parties*.—Next-of-kin and executors of former wills, and persons who have been granted administration, can, as they could under the old practice, put the executor on proof of the will in solemn form, before probate has been granted in common form, without being liable to costs (*Green v. Proctor*, 1828, 1 Hag. Con. 340, next-of-kin; *Mansfield v. Shaw*, 1818, 3 Phillim. 22, and *Boston v. Fox*, 1860, 29 L. J. P. & M. 68 and 195, executor of former will; *Dobbs v. Chisman*, 1810, 1 Phillim. 110 n., creditor to whom administration has been granted): provided they do not do so vexatiously or set up an unjustified charge of fraud or conspiracy (*Barry v. Butlin*, 1838, 2 Moo. 482), or they may be condemned in costs or left to pay their costs (*Huble v. Clarke*, 1827, 1 Hag. Con. 127; *Coppin v. Dillon*, 1833, 4 *ibid.* 375; *Constable v. Tufnell*, *ibid.* 508); and the same result follows if they put the executor on proof in solemn form after proof in common form has been taken (*Bell v. Armstrong*, 1822, 1 Add. 375).

In the Prerogative Court, when the executor so called upon to prove a will in solemn form put in his allegation (as to the validity of the will), and examined witnesses in support of it, the next-of-kin or person entitled in distribution to the estate or the executor of a former will was entitled, without pleading, to administer interrogatories by way of cross-examining the witnesses, without being liable for costs, provided that the interrogatories did not make unwarrantable charges; while, if they pleaded, they ran the risk of being condemned in costs at least from the time of pleading. This privilege did not extend to a legatee, who, if he interrogated the executor's witnesses, was liable for costs, especially if he was a mere legatee (*Urquhart v. Fricker*, 1826, 3 Add. 57). This privilege has been continued in the present practice, and "the party opposing a will, if with his defence he gives notice to the party setting up the will that he merely insists on the will being proved in solemn form and only intends to cross-examine the witnesses produced in support of the will, is only liable to the same liabilities as he would have been under similar circumstances according to the practice of the Court of Probate" (Order 21, r. 18), *i.e.* is not liable for costs; but this only applies to persons who under the old practice of the Court could insist on proof in solemn form, *e.g.* next-of-kin or executors of former will, and will not shield from costs a residuary legatee or legatee under a prior will who compels proof in solemn form of a later will (*Hockley v. Wyatt*, 1882, 7 P. D. 239); or a person who, after giving this notice, insists on the action being tried by a jury (*Foley v. Brogan*, 1883, Ir. L. R. 11 Ch. D. 421), or only gives this notice after delivering his defence (*Bone v. Whittle*, 1866, L. R. 1 P. & D. 249), or charges undue influence and fraud against the person propounding the will (*Harrington v. Harrington*, 1871, L. R. 2 P. & D. 264; *Ireland v. Kendall*, 1866, L. R. 1 *ibid.* 194), or calls in probate with a view to rescinding it (*Beale v. Beale*, 1874, L. R. 3 P. & D. 179); or a person who gives this notice after putting the executor upon proof in solemn form "as ancillary to another suit pending as to realty, and as a bill of discovery to get evidence available on an issue at common law" (Sir C. Cresswell, *Swinfen v. Swinfen*, 1858, 1 Sw. & Tr. 283). On the other hand, this notice will protect a defendant who gives notice in this way, that if both attesting witnesses to a will are called he will only cross-examine them, his defence alleging undue execution and incapacity (*Summerell v. Clements*, 1862, 3 Sw. & Tr. 35; *Leeman v. George*, 1868, L. R. 1 P. & D. 342); and a defendant who sets up a defence of want of knowledge and

approval by the testator of the contents of the will (*Cleare v. Cleare*, 1869, L. R. 1 P. & D. 655); and in a recent case a Divisional Court has held that on such a notice the Court has no jurisdiction to condemn the party giving it in costs, except when he has taken proceedings to call in the probate (*Leigh v. Green*, [1892] Prob. 17).

A next-of-kin calling in probate at an unjustifiable time, or entering a caveat, though not cited or intervening, is liable to costs (*Ratcliff v. Barnes*, 1862, 2 Sw. & Tr. 486; *Clayton v. Davies*, 1863, 3 *ibid.* 290), and is not at liberty to oppose probate of will made good in a suit between the executor and another next-of-kin. A next-of-kin who has been cited but has not appeared in a suit by an executor setting up a will, has been condemned in the costs of the suit for destroying the will (*King v. Gillard*, 1867, L. R. 1 P. & D. 539).

An heir-at-law is on the same footing as regards costs as a next-of-kin, and is liable or entitled to costs according as a next-of-kin would be (*Fyson v. Westrope*, 1857, 1 Sw. & Tr. 279; *Smyth v. Wilson*, 1866, 36 L. J. P. & M. 82).

(4) *Interveners*.—An intervener, where he is a necessary party, and so made by an order of the Court, is entitled to costs out of the estate, even though unsuccessful (*Singleton v. Thomlinson*, 1878, 3 App. Cas. 404); and a successful intervener (an heir-at-law), although not cited, is entitled to costs out of the estate if the will is pronounced against for want of knowledge by the testator of its contents, though charges of undue influence and fraud made against the executors propounding it are negatived (*Rayson v. Parton*, 1869, L. R. 2 P. & D. 38). Ordinarily, where the executor is before the Court and interveners support the will, they will not get costs out of the estate (*Colins v. Fraser*, 1829, 2 Hag. Con. 368); but where they are interested next-of-kin and intervene in order to take the opinion of the Court on an alteration in a will (pronounced invalid), they get their costs out of the estate (*Burgoyne v. Showler*, 1844, 1 Rob. Eccl. 5; *Cross v. Cross*, 1864, 3 Sw. & Tr. 300). Interveners cited and falsely charged with undue influence by the defendants in a probate suit get their costs from the latter, who had to pay the plaintiffs' costs as well (*Tennant v. Cross*, 1886, 12 P. D. 4); but they have been refused their costs where a legacy made to them, though at first denied by the executor in his affidavit of scripts, was afterwards admitted by him in his plea, and they nevertheless appeared by counsel at the trial (*Shawce v. Marshall*, 1858, 1 Sw. & Tr. 129).

[*Authorities*.—Tristram and Coote, *Probate Practice*, 12th ed.; Powles and Oakley, *Probate*, 1892.]

DIVORCE.—The general rules governing costs in divorce proceedings are that they are in the discretion of the Court, and that there is no appeal on the subject of costs only (*ibid.*). The Rules of the Supreme Court do not apply to the procedure or practice in proceedings for divorce or other matrimonial causes (Order 68, r. 1 (*d*)); and consequently the statutory rules (of 1866) formerly regulating the subject of costs in the Divorce Court are still in force in the Divorce Division. But this provision does not override the words in sec. 49 of the Judicature Act, 1873, that "no order of the High Court . . . as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or judge making the order"; and appeals can thus be brought from the Divorce Division by leave of the judge in the same way as from any other Court (*Smith v. Smith*, W. N., 1882, 91), though not without such leave where it is a matter for the discretion of the judge (*Butler v. Butler*, 1890, 15 P. D. 126). The rules which have been laid down by statutory authority or practice for the exercise of the discretion of the

- Court over costs may be considered according as they relate to (1) husbands, (2) wives, (3) co-respondents, (4) interveners, (5) or the Legitimacy Declaration Act.

(1) *Husbands*.—The husband, besides being generally liable to pay his own costs, is also, as a general rule, whether the wife be successful or not, and whether she be petitioner or respondent, liable to pay his wife's costs, taxed as between party and party, incurred by her up to the time of the case being set down for trial, and to pay them when it is so set down; and he is also liable to pay into Court or give security for an amount fixed by the registrar as sufficient in his judgment to cover the wife's costs in connection with the hearing of the case. The reason for this liability is that under the old law the "marriage gave all the property to the husband, and the wife had no other means of obtaining justice" (Sir J. Nicholl, *Bevor v. Bevor*, 1809, 3 Phillim. 263; and so Dr. Lushington, *Walker v. Walker*, 1837, 1 Curt. 564). "The rule, however, is not universal—the exception is where the reason fails—where the wife has separate property of her own, for then the marriage does not give all the property to the husband" (*ibid.*). A wife is, however, entitled to an order *pendente lite* on her husband to pay her costs already incurred, and secure her future costs, even though she has separate property more than enough to pay her costs, for this is a question for the judge's discretion (*Allen v. Allen*, [1894] Prob. 134, the husband having an income of £4000 a year, the wife one of £280, and £500 a year alimony during suit). If the husband fail to give such security and he is petitioner in the suit, proceedings may be stayed till he does so; and a bankrupt husband claiming damages in a petition for dissolution of marriage may be required to give security for costs unless he gives up his claim (*Smith v. Smith*, 1882, 7 P. D. 227); and disobedience to the registrar's order to give security is punishable by attachment (*Lynch v. Lynch*, 1885, 10 P. D. 183; *Bates v. Bates*, 1889, 14 *ibid.* 17), even though the husband is an undischarged bankrupt (*Shine v. Shine*, [1893] Prob. 289, husband respondent); but if the husband has no means, attachment may not be ordered (*Clarke v. Clarke*, [1891] Prob. 278, husband petitioner); and no attachment can issue for unpaid costs (*Weldon v. Weldon*, 1885, 10 P. D. 72). Where a husband is an infant, his guardian is liable to the wife for her taxed costs (*Beavan v. Beavan*, 1862, 2 Sw. & Tr. 652, husband petitioner); and where a husband dies before the cause is heard, taxed costs must be paid to the wife's solicitor (*Hall v. Hall*, 1864, 3 Sw. & Tr. 390). Where the wife returns to cohabitation during proceedings in her suit against her husband, the husband can only get the petition dismissed on paying her taxed costs (*Cooper v. Cooper*, 1864, 3 Sw. & Tr. 392). A husband can sue *in forma pauperis* for dissolution of marriage (Divorce Act, 1857, s. 54); under the practice of the Divorce Division (subject to sec. 51 of the Divorce Act, 1857, *ante*), where he does so and is successful, he gets only his or his solicitor's costs out of pocket, including those of the certificate and a reasonable sum for office expenses, against the co-respondent; but if he fails, the wife or the co-respondent can get an order for their full costs against him for what it is worth; and it seems that a wife can get an order for security against a pauper husband with a stay of proceedings on his failure to provide it, but no general rule can be laid down in this case, each case being dealt with on its own merits, and special regard being had to the nature of the wife's defence (*Richardson v. Richardson*, [1895] Prob. 276, Jeune, P., approved by C. A., *ibid.* 346). A pauper petitioner neglecting to proceed may be punished with costs and a stay of proceedings (Divorce Court Rules, 1866, r. 27).

The remedy given by the Divorce Court Rules of 1866 (158, 201)

is concurrent with and not substituted for the rule of common law respecting this liability of the husband for his wife's costs; thus a husband has been held liable at common law for the costs of his wife filing a petition in the Divorce Court for judicial separation for cruelty and adultery, even though the petition be not persevered in and the practice of the Divorce Court was not followed (*Rice v. Shepherd*, 1862, 12 C. B. N. S. 332); and it has been held that a wife may pledge her husband's credit for all costs as between solicitor and client reasonably incurred by her in a divorce suit against her husband, e.g. costs before but leading up to the institution of the suit; extra costs in the suit as between solicitor and client, though disallowed on taxation as between party and party; extra costs as between solicitor and client of rectifying the wife's settlement after a decree *nisi* had been pronounced, such costs having been allowed on taxation as between party and party (*Ottaway v. Hamilton*, 1878, 3 C. P. D. 393), and her solicitor can recover such costs from her husband (*Wells v. Wells*, 1858, 1 Sw. & Tr. 318; *Robertson v. Robertson*, 1881, 6 P. D. 119 and 122); though costs incurred before the institution of a suit for judicial separation on a wife's behalf are not usually recoverable from a husband, because his liability only begins with the suit (*Dickens v. Dickens*, 1859, 2 Sw. & Tr. 103). See also TAXATION.

(2) *Wife*.—The general rule is that if the wife succeeds at the trial she gets her full costs; while if she fails the "usual order" is made, viz. that the sum of money paid in or secured by the husband for her costs is paid out to her solicitor in satisfaction of his costs; while she is entitled to receive before trial the costs incurred by her *pendente lite* up to the time of trial. This last rule does not apply, however, against any other party but a husband, and thus the father of a minor petitioning for nullity of the latter's marriage is not liable to pay the *de facto* wife her fixed costs (*Wells v. Wells*, 1864, 3 Sw. & Tr. 364). In the former case costs follow the decree as a matter of course if the Court gives no direction about them (*Kaye v. Kaye*, 1858, 4 Sw. & Tr. 239; *Dixon v. Dixon*, 1859, 28 L. J. P. & M. 96). In the latter case, under the old practice the wife was not entitled to more than the sum so secured beforehand by the husband, unless the Court under special circumstances so ordered (*Keats v. Keats*, 1859, 1 Sw. & Tr. 334; *Winstone v. Winstone*, 1861, 2 *ibid.* 246; *Rolt v. Rolt*, 1864, 3 *ibid.* 604); and it was therefore necessary for the solicitor to see that the registrar fixed a sufficient amount (*Sopwith v. Sopwith*, 1860, 2 Sw. & Tr. 105, where it was said that "the wife was in the same position as any other failing suitor as regards anything beyond the sum fixed by the registrar"; *Glennie v. Glennie*, 1863, 3 *ibid.* 109); and application might be made by summons to the judge to increase its amount (*Madan v. Madan*, 1868, 18 L. T. 337). Under the modern practice, however, though costs are in the discretion of the judge, the guiding rule is that the wife is entitled to all the costs reasonably incurred by her in prosecuting the suit, even though their amount exceeds the sum paid or secured by the husband (*Robertson v. Robertson*, 1881, 6 P. D. 119, C. A.); but in such case the Court will not give its decision till the wife's bill of costs is taxed (Sir J. Hannen, *Smith v. Smith*, 1882, 7 P. D. 84). Costs under the "usual order" should be asked for at the trial (r. 159, D. C. R.); but under special circumstances they can be applied for after the hearing (*Conradi v. Conradi*, 1866, L. R. 1 P. D. 63; *Somerville v. Somerville*, 1867, 36 L. J. M. 87). In the case of a wife without means of her own this question concerns her solicitor more than it does her, and the Court may, in its discretion, refuse to make the husband liable for the wife's costs beyond the amount which he has paid or secured

for that purpose, if the solicitor is guilty of misconduct or vexatious and oppressive conduct towards the husband in instituting or defending the action. If the wife fails in the action, whether she be petitioner or respondent, although the general rule is as stated above, the question is still in the discretion of the Court, and the wife may have even the secured costs refused to her, either on account of her solicitor's misconduct (*Flower v. Flower*, 1873, L. R. 3 P. & D. 132) or her own conduct (*Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435); and no appeal lies from the exercise of the discretion by the Court (*Butler v. Butler*, 1890, 15 P. D. 126; *Russell v. Russell*, [1892] Prob. 152, where the bond given by the husband for the wife's costs was refused enforcement); and even the payment for her costs *pendente lite* (i.e. before the trial) may be refused (*Rogers v. Rogers*, 1865, 34 L. J. M. 87).

As has been already indicated, the wife is also not entitled to have her costs of suit if she has separate estate; and the Court in such a case may refuse to make the "usual order" (*Heal v. Heal*, 1867, L. R. 1 P. & D. 300, suit for judicial separation; *Jones v. Jones*, 1872, 2 *ibid.* 333, *ibid.*). Thus a wife (respondent) having separate property, and being found guilty of adultery in a dissolution suit, was refused the "usual order," and on the petitioner's application was ordered to pay the whole costs of the suit (*Millward v. Millward*, 1887, 57 L. T. 569); where a wife (respondent) and the co-respondent in a dissolution suit appeared and pleaded, but withdrew their pleas, and a decree *nisi* was made, the Court ordered the wife, who had a large separate income, to pay the costs of the proceedings, and the co-respondent to pay the costs incurred by the issues which he had raised in his answer (*Milne v. Milne*, 1871, L. R. 2 P. & D. 202). A wife possessed of separate estate, whose marriage has been dissolved, on her husband's petition, with costs against the co-respondent, may be ordered to pay the costs if they cannot be recovered from the co-respondent, if the application be made at the trial; but the Court cannot do so after the decree has been made absolute (*Wait v. Wait*, 1871, L. R. 2 P. & D. 228). If the wife has property at the time that judgment is given which is liable to costs, the Court may condemn her in costs without inquiring whether she had it at the time of the offence proved against her (*Hyde v. Hyde*, 1888, 59 L. T. 523). A wife failing in a suit for nullity, and being possessed of a separate income, was ordered to pay the costs of the suit (*M. v. C.*, 1872, L. R. 2 P. & D. 414). A wife possessed of a sufficient separate income, respondent in a suit by the husband for restitution of conjugal rights, who made and abandoned at the trial charges of serious misconduct against the husband, and afterwards evaded the effect of the decree in favour of the husband by staying out of the jurisdiction, was condemned in the whole costs of the proceeding (*Miller v. Miller*, 1869, L. R. 2 P. & D. 13). On the same principle, where the wife had the whole income under a scheme for varying marriage settlements put before the Court, no order was made as to the costs of the application to vary them (*Boynton v. Boynton*, 1861, 2 Sw. & Tr. 275).

It has already been pointed out that a wife may be deprived of her costs on account of her misconduct, e.g. the costs of a counter-charge against the husband unreasonably made and based on false evidence (*Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435); or her costs in a nullity suit brought by her against her husband in which she failed, and he was ordered to pay a certain sum towards her costs, and she afterwards brought a dissolution suit, in which she succeeded, and the husband was ordered to pay her costs, but was allowed to deduct the costs of the first suit, which was erroneously or improperly instituted (*Ditchfield*

v. *Ditchfield*, 1869, L. R. 1 P. & D. 729). Similarly, where a suit for nullity was brought by a next-of-kin, but there was a delay of three years on the part of the petitioner, during which time the husband had to support his lunatic wife, though a nullity decree was made, no order was given as to costs (*Hancock v. Peaty*, 1867, L. R. 1 P. & D. 335). Where a wife's petition for divorce on the ground of adultery and cruelty, charging the husband with communicating venereal disease and general charges of cruelty, was dismissed, it was held that she was only entitled to her costs on the main charge of cruelty and adultery, but not to costs on the other charges, the subjects of which had been obviously condoned (*Ash v. Ash*, [1893] Prob. 222). Where a wife, besides traversing a charge of adultery, made counter-charges which were unfounded, the Court ordered that the petitioner's costs of meeting the counter-charge should be deducted from the wife's costs of traversing the charges against her (*Clark v. Clark*, 1865, 4 Sw. & Tr. 111); and similarly a husband (petitioner) has been allowed to deduct the costs incurred by him in meeting unfounded charges made against him by the respondent from the sum paid by him into Court for her costs (*Morgan v. Morgan*, 1869, 38 L. J. P. & M. 41). Where a wife failed in a divorce suit which she had brought, failing to prove adultery, and withdrawing at the trial a charge of cruelty, and no order had been made on the husband to secure her costs, the Court refused, on further argument on the point, to make any order (*Thompson v. Thompson*, 1886, 57 L. T. 374). Where the wife's suit was successful at the hearing owing to collusion which was known to her solicitors, but was afterwards dismissed and the decree *nisi* rescinded on intervention by the Queen's Proctor, she was deprived of the costs of the hearing, although they had been paid into the registry (*Butler v. Butler*, 1890, 15 P. D. 32). In a suit instituted *alio intuitu* and not *bona fide* by the wife, her taxed costs prior to the hearing were ordered to be deposited in the registry instead of being paid over to her solicitors (*Rogers v. Rogers*, 1865, 4 Sw. & Tr. 82). Where a husband gets a decree for restitution of conjugal rights and the wife disobeys it, though the Court has no jurisdiction to order a settlement of property for the benefit of husband and children if it is settled to her separate use without power of anticipation, the petitioner is not made to bear the wife's costs of the suit (*Michell v. Michell*, [1891] Prob. 305).

The privileges of a wife as to costs, however, are much more extensive than her liabilities. Thus (though the costs in an appeal are in the discretion of the Court of Appeal) the wife is entitled to security for costs of an appeal, and the husband's bond to secure her costs in the original hearing will not be cancelled where an appeal by her is pending against a decision dismissing her petition (*Jones v. Jones*, 1871, L. R. 2 P. & D. 333); though, if she appeals unsuccessfully, no provision is made for her costs (*Otway v. Otway*, 1888, 13 P. D. 141). The Court of Appeal has power to order the costs incurred by the husband in an unsuccessful appeal by the wife, to be paid out of the money he has paid into Court to defray her costs at the hearing; but even though an appeal is hopeless unless the wife's solicitor has acted vexatiously or oppressively against the husband in conducting the appeal, the former will not be deprived of his lien upon the trial for his costs (*Hall v. Hall*, [1891] Prob. 302); but if the appeal is a proper one, the husband cannot deduct his costs of appeal from any costs payable to the wife (*Wilson v. Wilson*, 1871, L. R. 2 P. & D. 353). If, however, she is respondent and not appellant in the appeal, even though she is unsuccessful on appeal after getting a decree of judicial separation in the

Diyoree Court and her costs, she is entitled to her costs both in the Court below and on appeal (*Holt v. Holt*, 1858, 28 L. J. P. & M. 12; *Otway v. Otway*, above—a case where both husband and wife were guilty of adultery and the husband of aggravated cruelty, and the Divorce Court granted a judicial separation, and not a dissolution, for which both parties petitioned). A wife who, after obtaining a decree *nisi* with costs for dissolution, is afterwards found guilty of adultery while the suit was pending, and the decree rescinded on the intervention of the Queen's Proctor, is still entitled to her costs taxed up to the time of her adultery, and also the costs of the hearing, though not so taxed, out of the sum secured in the registry (*Whitmore v. Whitmore*, 1866, L. R. 1 P. & D. 96); though she cannot tax her costs against the husband after she has been proved guilty of adultery (*Keats v. Keats*, 1859, 1 Sw. & Tr. 358). A wife (respondent) who is unsuccessful in a suit, but successful in her counter-charges, is held entitled to her full costs (*Chaldecott v. Chaldecott*, 1873, 29 L. T. 699). A wife successful in a suit can get an order for payment of the balance of the costs of hearing over the sum paid into Court, in spite of a motion by the husband for a new trial and a bill of exceptions pending (*Cooke v. Cooke*, 1864, 3 Sw. & Tr. 603; *Chetwynd v. Chetwynd*, 1865, 4 *ibid.* 108; *Burroughs v. Burroughs*, 1862, 31 L. J. P. & M. 124), or the intervention of the Queen's Proctor (*Gladstone v. Gladstone*, 1875, L. R. 3 P. & D. 260). A wife is entitled to her full costs of an abortive trial, *e.g.* where jury disagree (*Hurley v. Hurley*, [1891] Prob. 367; *DeLaforce v. DeLaforce*, 1892, W. N. 68). Where a new trial is granted on a wife's application, and she has no means, the husband must generally pay the costs of both sides in the first trial (*Nicholson v. Nicholson*, 1863, 3 Sw. & Tr. 214). Where a new trial is granted on the application of the husband, he is generally liable for his own and his wife's costs of the first trial, and must pay them before the new trial if it is to be had on the same grounds as the first trial; but if it is on different grounds, *e.g.* in first suit adultery alleged with A., and in second suit with B., the causes of action are different, and the Court may refuse to stay proceedings in the second suit till the costs have been paid (*Yeatman v. Yeatman*, 1869, 39 L. J. P. & M. 37). A wife suing *in forma pauperis*, and successful, is allowed her costs (*Afford v. Afford*, 1861, 2 Sw. & Tr. 387). As seen already, she may be liable to pay her husband's costs if she has separate estate, but she is not ordered to do so if this would deprive her of the means of subsistence (*Carstairs v. Carstairs*, 1864, 3 Sw. & Tr. 538); and before such an order will be made against her she is entitled to have notice given her, though she has not appeared at the hearing of her husband's petition for divorce (*Field v. Field*, 1887, 13 P. D. 23); and in spite of the husband's apparent inability to pay her costs, *e.g.* a workman earning twenty-four shillings a week, he may be ordered to pay the wife's taxed costs (*Ward v. Ward*, 1859, 1 Sw. & Tr. 484). But where a husband obtained leave to amend his answer to his wife's petition for judicial separation by counter-charging her with adultery, and then became bankrupt on his own petition, an application by the wife to rescind the order giving leave to amend was rejected (*Greator v. Greator*, 1864, 34 L. J. P. & M. 9). If a wife, though guilty of adultery, has a good defence to a husband's petition (*e.g.* connivance) she gets her costs (*Elyatt v. Elyatt*, 1864, 3 Sw. & Tr. 503). She is not entitled, as of course, to her costs of appeal in an interlocutory matter where she is appellant and fails against her husband (*Thompson v. Thompson*, 1861, 2 Sw. & Tr. 402, see above); nor costs of trying to prevent a decree *nisi* being made absolute (*Stoate v. Stoate*, *ibid.* 384); nor costs of a special jury (*Scott v. Scott*, 1862, 32 L. J. M. & P. 40; *Taylor v. Taylor*, 1863, *ibid.* 126, the certificate

for which should be applied for by the successful party at the end of the hearing; *Skipper v. Bodkin*, 1860, 2 Sw. & Tr. 1); nor the costs of trying to enforce payment of certain taxed costs by *fi. fa.*, although the wife had an order for them upon the petitioner, and the proceedings were ordered to be stayed till the fixed costs had been paid (*Keane v. Keane*, 1873, L. R. 3 P. & D. 52).

"The costs of a wife in matrimonial cases are taxed as between party and party, but not in all respects on the same principles as a taxation at common law between party and party" (*Allen v. Allen*, 1860, 2 Sw. & Tr. 107); thus the costs of witnesses to a plea not in issue, but having a bearing on the case, and the costs of witnesses not called, if the case requires to be well proved, are allowed (*ibid.*; and so *Finney v. Finney*, 1870, 21 L. T. 597). Where a respondent and a co-respondent were both acquitted of a charge of adultery, and the petitioner was also acquitted of a counter-charge of adultery, the respondent was only allowed her full costs of the first issue, but only half of those of the second, as it was a joint charge made by herself and the co-respondent (*Burroughs v. Burroughs*, 1862, 31 L. J. P. & M. 124). A wife wishing to substitute a petition for dissolution of marriage in place of one for judicial separation, may do so on paying costs of the suit up to the motion for such purpose (*Lewis v. Lewis*, 1860, 29 L. J. P. & M. 123; and so *Frebout v. Frebout*, 1861, 30 *ibid.* 214). Where a wife suing for judicial separation settles the suit with her husband on the terms of a separation deed being executed, and the husband paying the wife's taxed "costs of suit," it was held that the costs of and incident to the preparation and settlement of the deed were not "costs of suit," and the Court had no jurisdiction over them (*Lancaster v. Lancaster*, [1896] Prob. 75 and 118, C. A.).

The lien of the wife's solicitor for his costs incurred in her behalf extends to all moneys received by him on her account in the course of the suit, and he may include in his costs costs disallowed on taxation as between her and her husband, but allowed as between attorney and client (*Bremner v. Bremner*, 1866, L. R. 1 P. & D. 254, *e.g.* alimony *pendente lite*). A gross or annual sum secured by the order of Court, and to be paid by the husband under sec. 32 of Divorce Act, 1857 (20 & 21 Vict. c. 85), not being alimony on a sum paid under sec. 1 of the Act of 1866 (29 & 30 Vict. c. 32), is chargeable by the Court under the Solicitors Act as "property recovered or preserved by the solicitors," but in its discretion the Court may refuse to make such order, if the debt upon the facts is one for which the husband was *prima facie* responsible, and the wife's other estate is subject to a restraint on anticipation (*Harrison v. Harrison*, 1888, 13 P. D. 180). An application to continue an injunction against a husband's parting with property in favour of the wife's solicitor, and to appoint a receiver (where she had got a decree for judicial separation, but a reconciliation had taken place), has been refused (*Haves v. Haves*, 1886, 57 L. T. 374); but where, after the husband had appeared and answered to a petition by the wife for dissolution of marriage, and she returned to cohabitation, a motion by the husband to dismiss the suit was ordered to stand over till the wife's solicitor had time to tax his bill of costs against the husband (*Dixon v. Dixon*, 1871, L. R. 2 P. & D. 253). The wife's death pending suit will not usually deprive the solicitor of his taxed costs if he is diligent in taxation, but he must sue the husband at common law for them. Where the wife's (respondent) solicitor allowed the suit to be undefended at the trial from wrongly thinking that a notice by letter from the petitioner's solicitor stating that he had set down the cause for trial was insufficient, a new trial was ordered, on the solicitor personally

undertaking to pay the costs so thrown away (*Fluister v. Fluister*, [1897] Prob. 22).

Respondents, whether husbands or wives, may be heard as to costs without answering the petition in the principal cause (Divorce Court Rules, r. 50).

The Court has power under a petition to vary marriage settlements by either party to deal with the capital as well as the income thereof (1859, 22 & 23 c. Vict. 61, s. 5); and may make an order which may affect the interests of third parties created before the institution of proceedings for variation of the settlement (*Hannen, P., Wigney v. Wigney*, 1882, 7 P. D. 228, where a charge in favour of a solicitor given by a husband (respondent) on the day that a decree *nisi* was pronounced in a petition by his wife, and covering the husband's interest in the settled property, was upheld). But where the marriage was dissolved on the wife's petition, and the husband had brought the whole corpus of the funds into settlement, the Court in its discretion refused to order the payment of the petitioner's costs out of the fund (*Ponsonby v. Ponsonby*, 1884, 9 P. D. 58 and 122); while, on the other hand, where under the like circumstances the petitioner (wife) had brought all the corpus into settlement, the Court allowed part of the funds to be applied to paying the balance of the petitioner's costs of suit and of the petition to vary settlements (*Hipwell v. Hipwell*, [1892] Prob. 147).

(3) *Co-respondents*.—By the Divorce Act, 1857, s. 34, the Court was empowered to order an adulterer to pay the whole or part of the costs of the proceedings, if made a co-respondent and adultery be established, and petition be by husband. As a general rule, where adultery is established against the co-respondent, and he knows, or should have known, that the respondent was a married woman, he is condemned in the costs of the suit (*Badcock v. Badcock*, 1858, 1 Sw. & Tr. 188; *Lyne v. Lyne*, 1868, L. R. 1 P. & D. 508). Where the co-respondent dies before paying the costs in which he has been condemned, the petitioner may be appointed receiver of his estate (*Waddell v. Waddell*, [1892] Prob. 226). Where a husband dies after a decree absolute has been made for dissolution of his marriage with the respondent and an order that the costs should be paid by the co-respondent, the husband's representative can enforce such order for costs (*Hawks v. Hawks*, 1876, 1 P. D. 137). Costs may be given against the co-respondent, where adultery is established, though the petitioner has not asked for them (*Finlay v. Finlay*, 1861, 30 L. J. P. & M. 104); or in such a case he may be only condemned in the costs of the part of the case in which he fails, *e.g.* costs of failing to prove condonation or adultery by the petitioner, but not the costs of the issue of adultery with the respondent if he did not know that she was a married woman (*Howe v. Howe*, 1867, 15 W. R. 498). So, where a suit was dismissed on account of the husband's adultery, the co-respondent was only condemned in the costs of proving his adultery (*Bremner v. Bremner*, 1864, 3 Sw. & Tr. 378), the Judge Ordinary, however, saying that "where a jury has found a verdict of adultery against a co-respondent, he is primarily liable for costs, and he ought not to be relieved from payment of them merely because the husband has been guilty of adultery with another woman" (so *Codrington v. Codrington*, 1865, 4 *ibid.* 63). Where a petitioner was guilty of adultery after a decree *nisi* with costs against the co-respondent, and the decree was rescinded on the intervention of the Queen's Proctor, the order as to costs was not rescinded (*Hulse v. Hulse*, 1872, L. R. 2 P. & D. 357); though in another case of similar circumstances, except that the husband's adultery was before the decree, it was rescinded (*Ravenscroft v. Ravenscroft*, 1872, L. R. 2 P. & D. 376). Where a decree *nisi* for dissolution of marriage has been made, with costs against a co-

respondent, and no steps have been taken for six years to enforce the order, application must be made to the Court for an order for petitioner to be at liberty to issue execution against the co-respondent (*Goodwin v. Goodwin*, [1897] Prob. 87).

In certain mitigating circumstances a co-respondent is not ordered to pay the costs of the suit, though left to bear his own costs; where no evidence of the circumstances under which the adulterous connection was formed is given, and it does not appear that the co-respondent knew that the respondent was a married woman, he will not be condemned in costs (*Teagle v. Teagle*, 1858, 1 Sw. & Tr. 187); nor has he been, though knowing that the respondent was married, where she was leading an abandoned life when he first knew her, as the petitioner must have been aware, and the Court held a claim by the petitioner for damages improper (*Manton v. Manton*, 1865, 4 Sw. & Tr. 159); nor where the wife was profligate, to the knowledge of the husband, before her adultery with the co-respondent (*Boyd v. Boyd*, 1859, 1 Sw. & Tr. 562), but in spite of the remissness of the husband, a co-respondent has been condemned in costs, who knew that the respondent was married (*Lyne v. Lyne*, above); nor is he condemned in the costs of a first trial where the jury failed to agree, and at the second trial the petitioner got a verdict and decree condemning the co-respondent in costs (*Ward v. Ward*, 1868, L. R. 1 P. & D. 467); nor where the petitioner had lived apart from the respondent, owing to her intemperance, for several years, and during the separation and before the adultery she lived abandonedly, though the co-respondent must have known that she was married (*Nelson v. Nelson*, 1868, *ibid.* 510); nor where the husband had condoned adultery with the co-respondent, which was revived by respondent's adultery with another person (*Norris v. Norris*, 1861, 4 Sw. & Tr. 237); and where the husband's petition for dissolution was dismissed for his misconduct conducing to his wife's adultery and for adultery, but the wife's adultery was proved, the co-respondent was not condemned in costs, nor allowed to recover his against the petitioner (*Seddon v. Seddon*, 1862, 2 Sw. & Tr. 640). Where the respondent was found guilty of adultery but there was not sufficient evidence against the co-respondent to convict him, though his conduct was such as to raise reasonable suspicion, the Court did not allow his costs (*Robinson v. Robinson*, 1860, 32 L. J. P. & M. 210).

On the other hand, the co-respondent is entitled to recover his costs from the petitioner where he is dismissed from the suit as blameless or out of the Court's jurisdiction (*Wilson v. Wilson*, 1872, L. R. 2 P. & D. 353); where the co-respondent's adultery was proved, but the petitioner had been guilty of incestuous adultery, and the petition was dismissed, the former was given his costs on the latter issue, on which he succeeded, though condemned in them on the former issue (*Conradi v. Conradi*, 1866, L. R. 1 P. & D. 163); where a husband petitioned for divorce on the ground of his wife's adultery with two co-respondents, claiming damages against one of the latter, and the jury found that the husband had condoned the adultery with the co-respondent against whom he claimed damages, and that no damages were payable by him in respect thereof, it was held that this condonation was not invalidated by the fact that the husband did not then know of the wife's adultery with the other co-respondent, and that the petitioner was not entitled to judgment even for a nominal amount against the co-respondent whose offence he had condoned, but the petition was dismissed, and the petitioner ordered to pay the co-respondent's costs (*Bernstein v. Bernstein*, [1893] Prob. 292, C. A.); where the petitioner

condoned the co-respondent's adultery and connived at the respondent's adultery with another person, the petition was dismissed and the petitioner ordered to pay the co-respondent his costs (*Adams v. Adams*, 1867, L. R. 1 P. & D. 333). Where a co-respondent appeared but did not plead, an application by the petitioner to dismiss the suit as against him for want of evidence was only granted on his paying the co-respondent's costs (*Smith v. Smith*, 33 L. J. P. & M. 11). The petition, however, may be dismissed and the co-respondent yet be refused his costs, e.g. where he had been indiscreetly familiar with the respondent (*Winscom v. Winscom*, 1864, 3 Sw. & Tr. 380); where the jury do not agree and are discharged, though the case is not proceeded with by the petitioner, provided he does not abandon it (*Bancroft v. Bancroft*, 1865, 34 L. J. P. & M. 144); where at a first trial the respondent and co-respondent called no witnesses and the jury failed to agree, but at the second trial the co-respondent called witnesses, and the jury found a verdict of not guilty, the petitioner was not ordered to pay the co-respondent's costs in the first suit (*Wight v. Wight*, 1867, L. R. 1 P. & D. 368); where at a first trial the co-respondent simply denied the charge and the jury failed to agree on a verdict, and at a second trial the co-respondent explained his conduct, and the jury acquitted him, he had to pay his own costs of the whole litigation, the second trial having been made necessary by his reticence and suspicious conduct at the first trial (*West v. West*, 1870, L. R. 2 *ibid.* 196). But where a petition was dismissed, the jury failing to agree, and no second trial was had, the petitioner was ordered to pay the co-respondent's costs, not having been justified in making him a party to the suit (*Whitmore v. Whitmore*, 1865, L. R. 1 *ibid.* 25). Where a co-respondent appears under protest to the jurisdiction, and the petitioner applied that the co-respondent should be dismissed from the suit on payment of his costs, the application was granted in spite of the opposition of the co-respondent (*Wilson v. Wilson* (2nd case), 1872, L. R. 2 P. & D. 353); and similarly, where a co-respondent, after entering appearance unconditionally, alleged in his answer that he was a domiciled foreigner, the Court held that he could be dismissed, but as he had not taken the earliest opportunity of disputing the jurisdiction, as in the last case, he was entitled only to his costs of appearance (*Grange v. Grange*, [1892] Prob. 245).

Where a co-respondent is condemned in costs, he is liable for the petitioner's and respondent's costs of varying the marriage settlements (*Gill v. Gill*, 1863, 3 Sw. & Tr. 359), and for such costs of the petitioner and the trustees of the marriage settlements (*Smilhe v. Smilhe*, 1868, L. R. 1 P. & D. 592). But if part of such application to vary fails, and the costs of that part are separable, its costs should not fall on the co-respondent (*Stone v. Stone*, 1864, 10 L. T. 140). Where a petitioner was found guilty of adultery and the suit was dismissed, but the co-respondent is ordered to pay the costs of proving his adultery with the respondent, this order was held to comprise all expenses incidental to filing and prosecuting the petition so far as that issue was concerned (*Baker v. Baker*, 1867, 36 L. J. P. & M. 119, following *Bremner's* case, above).

(4) *Interveners*.—Interveners not parties to a suit may intervene upon questions of custody, maintenance, or education of children of parents whose marriage is the subject of the suit (*Chetwynd v. Chetwynd*, 1865, L. R. 1 P. & D. 39, uncle and aunt intervening after decree *nisi* for dissolution of marriage; *March v. March*, 1867, *ibid.* 437, brothers of a guilty respondent after decree *nisi* for dissolution; *Godrich v. Godrich*, 1873, L. R. 3 *ibid.* 134, grandfather after decree of judicial separation), but they do so at their own risk as to costs. The costs of intervention, whether by the Queen's Proctor

or other persons in order to prevent a decree *nisi* being made absolute, are in the discretion of the Court. Where a decree *nisi* is alleged to have been obtained by collusion between the parties or suppression of material facts, the Queen's Proctor or any other person may intervene; and in case of collusion the Queen's Proctor may intervene officially; and the Court may order the costs arising from such intervention to be paid by the parties or such of them as it shall think fit, including a wife if she have separate property (1860, 23 & 24 Vict. c. 144, s. 7). Under this Act it was held that the Queen's Proctor could not be condemned in costs for an unsuccessful intervention (*Wilson v. Wilson*, 1866, L. R. 1 P. & D. 180), nor could a private individual (*Vivian v. Vivian*, 1870, L. R. 2 *ibid.* 100); and that the Queen's Proctor could only get his costs where he intervened officially in case of collusion, and not as one of the public (*Lantour v. Lantour*, 1864, 10 H. L. 685). This is extended to suits for nullity of marriage (1873, 36 & 37 Vict. c. 31, s. 1); and now a later statute provides that where the Queen's Proctor or any other person shall intervene or show cause against a decree *nisi* in any suit or proceeding for divorce or nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party thereto, occasioned by such intervention or showing cause . . . as may seem fit; and the Queen's Proctor or any other person as aforesaid, and such party or parties, shall be entitled to recover such costs in like manner as in other cases; provided that the Treasury may, if it shall think fit, order any costs which the Queen's Proctor shall by any order of the Court made under this section pay to the said party or parties to be deemed to be part of the expenses of his office (1878, 41 & 42 Vict. c. 19, s. 2).

Generally, the Queen's Proctor is condemned in costs whenever his intervention is uncalled for; and the same rule applies to any other intervener; but he is never directed to give security for costs pending the inquiry (Oakley, 88). A husband is not usually ordered to find security for the wife's costs of trying issues raised by the Queen's Proctor's intervention, *e.g.* collusion, suppression of material facts, and adultery charged against a wife (petitioner) who had obtained a decree *nisi* for dissolution of marriage (*Gladstone v. Gladstone*, 1875, L. R. 3 P. & D. 260). The costs occasioned to a wife by such intervention are within the discretion of the Court, and no appeal lies from an order refusing them (*Butler v. Butler*, 1890, 15 P. D. 126); but she is entitled to enforce an order for costs made with a decree *nisi* in her favour against her husband, in spite of the Queen's Proctor intervening to rescind the decree (*Gladstone's* case, above). Where a co-respondent has been found guilty of adultery with the respondent, and an order for costs and a decree *nisi* against the co-respondent have been pronounced, and the Queen's Proctor afterwards intervenes, but fails to get the decree rescinded, the Court will refuse to condemn the co-respondent in the costs of the Queen's Proctor's intervention (though it dismisses that intervention without costs), on the ground that he is not a party to that intervention, for he has not the right to appear in it (*Blackhall v. Blackhall*, 1888, 13 P. D. 94). On the other hand, if a husband gets a decree *nisi* for his wife's adultery, and the Queen's Proctor intervenes, alleging collusion between the respondent and co-respondent, and the latter is cited but does not appear, and the Court finds in favour of the Queen's Proctor, the co-respondent may be condemned in costs as being a party to the proceeding (*Taplen v. Taplen*, [1891] Prob. 283). The Queen's Proctor usually gets his costs where he successfully intervenes, but he may forego

them; and where, on the hearing of a petition by a wife for dissolution at which the Court granted a decree nisi, and the Queen's Proctor intervening alleged suppression of material facts, collusion, and condonation since the decree nisi, the Court rescinded the decree and dismissed the petition, the Queen's Proctor did not ask for costs, and the Court expressed the view that, unless some moral fault on the part of the petitioner is established, the decree may well be rescinded without costs (*Rogers v. Rogers*, [1894] Prob. 161, Jeune, P.). For examples of the Queen's Proctor not being given costs, see *Barnes v. Barnes* (1867, L. R. 1 P. & D. 505); *Cox v. Cox* (1861, 2 Sw. & Tr. 306); *Joyce v. Joyce* (1864, 33 L. J. P. & M. 200); and his being given costs, *Collins v. Collins* (1881, 44 L. T. 31).

Where the original decree, owing to intervention, is altered, the order for costs is such as would have been made if the facts disclosed on the intervention had been before the Court at the first hearing (*Ravenscroft v. Ravenscroft*, 1872, L. R. 2 P. & D. 376).

(5) *Legitimacy Declaration Act*.—The Court has power to order a party cited to all proceedings under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), to pay the petitioner's costs (*Bain v. A.-G.*, [1892] Prob. 217 and 261).

[*Authorities*.—See Browne and Powles, *Divorce*; Dixon, *Divorce*; Oakley, *Divorce*.]

ADMIRALTY.—In this article it is proposed to consider only—(1) the general rule as to costs under the Judicature Acts and Rules and Orders of the Supreme Court; (2) the general rules of the Admiralty Court as to costs; (3) payment of costs; (4) costs in particular actions and appeals.

(1) *Under the Judicature Act*.—The effect of Order 65, r. 1, of the R. S. C., 1883, cited at p. 481, was not to introduce so great a change into Admiralty proceedings as it did into those in the Queen's Bench; for in the Admiralty Court costs were already generally in the discretion of the Court, the only exceptions to the rule being introduced by the modern statutes dealing with Admiralty jurisdiction, *e.g.* in actions for necessities or for damage to cargo, or for wages, or for master's wages and disbursements, if the plaintiff did not receive £50, he was not entitled to any costs unless the judge certified that it was a proper cause to be tried in the Admiralty Court (Admiralty Court Act, 1861, ss. 5, 6, 10); if salvors sued in the Admiralty Court and failed to get an award of £200, they could not get costs without a similar certificate (M. S. A., 1854, s. 460); if a plaintiff brought an action without leave in the Admiralty Court which could have been brought in a County Court, and did not recover a sum exceeding the limit of the latter Court's jurisdiction, he did not get costs, and might be condemned to pay them without a similar certificate (County Courts Admiralty Act, 1868, 31 & 32 Vict. c. 71, s. 9). All such enactments are now of no force (*Rockett v. Clippingdale*, [1892] 2 Q. B. 293); but the principle underlying them of not allowing costs in High Court actions which might have been brought in a County Court, may guide the Court in its absolute discretion as to costs (*The Herald*, 1890, 6 Asp. 542; *The Asia*, [1891] Prob. 121; *The Zeta*, *ibid.* 216); though a better criterion seems to be whether the plaintiff has acted properly and reasonably in bringing his action in the High Court (*The Saltburn*, [1892] Prob. 333, Barnes, J.).

The same order provides that when issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and in fact, shall, unless otherwise ordered, follow the event (r. 2); that if a cause be removed from an inferior Court having juris-

diction in the cause, the costs in the Court below shall be costs in the cause (r. 3); that in actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum exclusive of costs not exceeding £50, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the Court or a judge so orders (r. 12). This last rule has been determined to apply only to an action which could have been brought in a County Court, *e.g.* not to a breach of promise action (*Saywood v. Cross*, 1884, 14 Q. B. D. 53); and it is doubtful whether it applies to an Admiralty action *in rem* which could be brought in a County Court only provided that the Court had Admiralty jurisdiction (Williams and Bruce, 464).

No appeal can be made from any order or judgment of the High Court as to costs only, which by law are left to the discretion of the Court, except by leave of the Court making such order (Judicature Act, 1873, s. 49); but this is subject to the exception of allowing such an appeal, where the judge, instead of exercising his discretion, has dealt with costs as governed by a general rule (*The City of Manchester*, 1880, 5 P. D. 221; *The Friedeberg*, 1885, 10 P. D. 111; *The Zeta*, [1892] Prob. 285).

(2) *Rules of Admiralty Court as to Costs.*—“Before the Judicature Acts the Court of Admiralty exercised its discretion as to costs in accordance with certain well-known rules of practice which are still recognised by the High Court in Admiralty actions” (Williams and Bruce, 465); and these rules are saved by provisions in the Rules of the Supreme Court. “Where no other provision is made by the Acts or these Rules, the present procedure and practice remain in force” (Order 72, r. 2), and “to a great extent the procedure and practice thus remaining in force is that founded on the Admiralty Court Rules of 1859” (Williams and Bruce, 565, Appendix); *e.g.* tender in Court in Admiralty causes (*The Mona*, 1894, 71 L. T. 24, where such a tender was held to be merely an offer, and not affected by Order 22), and the manner of serving a writ *in rem* (*The Solis*, 1885, 33 W. R. 659). So too the words of Order 65, r. 27, s. 37, are to the same effect: “The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court or Court of Appeal relating to costs . . . and taxation of costs existing prior to the commencement of the principal Act (*i.e.* that of 1873) shall, in so far as they are not inconsistent with the principal Act and these Rules, remain in force and be applicable to costs of the same or analogous proceedings . . . and taxation of costs in the High Court and Court of Appeal.” Under these words it has been held that the old Rules of the Court of Chancery are still binding on the judges of the Chancery Division (*Pringle v. Gloag*, 1876, 10 Ch. D. 678).

The following are some of the general rules established by the old Admiralty decisions. Though costs generally go to the successful party in an action, they do not follow the event as a matter of course, the Court having regard not only to the result, but also all the circumstances of the case (*The Albatross*, 1853, 1 Sp. Eccl. & Adm. 175, salvors only given half their costs; *The Calypso*, 1856, Swa. Ad. 29, no costs given on dismissing a suit where defendant appeared only under protest; *The North Star*, 1860, Lush. 51, bottomry bond pronounced against without costs; *The William*, 1861, Lush. 200, master's claim for wages reduced by nearly one-third, and master having to pay costs). The Court will not give costs where the law is very difficult or the question is one *primæ impressionis* (*The Golubchick*, 1840, 1 Rob. W. 154; *The Diana*, 1862, 32 L. J. Ad. 57; *The Fortitude*, 1843, 2 Rob. W. 225; *The Lord Auckland*, 1844, *ibid.* 301; *The Johannes*, 1860, Lush. 182; *The Jones Brothers*, 1877, 3 Asp. 478); and in a difficult case of

jurisdiction, where the process of the Court had been improperly set in motion, the plaintiff had to pay the marshal's fees of arrest and no costs were given (*The North American*, 1859, Swa. Ad. 467; *The Ironsides*, 1862, Lush. 467). A successful suitor will not be given his costs if he is guilty of misconduct (*The Glasgow Packet*, 1844, 2 Rob. W. 306, salvors misconducting themselves only getting a fixed sum *nomine expensarum* for costs; *The Catalina*, 1854, 2 Sp. Eccl. & Adm. 23, successful ship in a collision action losing costs because of her crew's misconduct after the collision; *The St. Lawrence*, 1850, 7 N. C. 556, successful ship in collision action refusing to lower a boat afterwards for a man overboard from the other ship; *The Trident*, 1854, 1 Sp. Eccl. & Adm. 224 note, successful plaintiffs in collision deprived of part of their costs because they made unfounded charges of misconduct against the other ship). The costs of a particular issue may be ordered to be paid to the party failing in it, irrespective of the general result of the case (*The Laurel*, 1863, B. & L. 191; *The Camellia*, 1883, 9 P. D. 27). Costs due to taking unnecessary proceedings, or introducing irrelevant matter, are disallowed; and the party causing it may have to pay the costs caused thereby to the other side (*The Apollo*, 1824, 1 Hag. 319, Lord Stowell; *The Washington*, 1841, 5 Jur. 1067; *The Nicolina*, 1843, 2 Rob. W. 175); and a plaintiff has been condemned in the costs of an adjournment (*The Kepler*, 1861, Lush. 201). Costs are imposed on a party improperly arresting another's property (*The Evangelismos*, 1858, Swa. Ad. 378; *The Catheart*, 1867, L. R. 1 Ad. & Ec. 314; *The Egerateia*, 1868, 38 L. J. Ad. 40, and other cases, Williams and Bruce, p. 467); or objecting to the release of a ship after bail has been given, on the ground of insufficiency of the bail (*The Corner*, 1863, B. & L. 161; Order 29, r. 6); and if an improper amount of bail is required, the Court may withhold costs or condemn the plaintiff in them (*The George Gordon*, 1884, 9 P. D. 46). See ARREST OF SHIP AND BAIL (ADMIRALTY). Where cargo is arrested for freight, its owner may, on bringing the freight into Court, deduct the costs of doing so (*The Leo*, 1862, Lush. 444). For the liability of a cargo owner in a bottomry suit, see BOTTOMRY. In Crown suits, the Crown cannot be condemned in costs, though a co-suitor of the Crown may in the whole costs of the suit (*The Leda*, 1863, B. & L. 19); but the commander of a Queen's ship may have costs given against him (*The Swallow*, 1856, Swa. Ad. 32).

The Court could always award costs in a specified sum *nomine expensarum* (as it can now in interlocutory applications, Order 65, r. 23). Generally, costs rank together with the claims in respect of which they are incurred and to which they are attached (*The Margaret*, 1835, 3 Hag. 240; *The W. F. Safford*, 1860, Lush. 71); but costs incurred by a party benefiting parties in other actions against the same property, as well as himself, are paid in priority to any other payment out of the fund in Court (*The Pasitheu*, 1871, 1 Asp. 133, costs of sale of ship by a claimant for necessities payable before captain's claim for wages and disbursements; *The Immacolata Concezione*, 1883, 9 P. D. 37, and *The Sherbro*, 1883, 5 Asp. 88, cases of similar circumstances to the last), unless such costs were incurred for the benefit of the party only who incurs them, when he bears them alone (*The Colonsay*, 1885, 11 P. D. 17). As to allowance and taxation of costs, see TAXATION.

(3) *Payment of Costs*.—Execution is seldom required to issue in Admiralty actions (Williams and Bruce, 479). Payment of costs is obtained either (a) if there are proceeds in Court liable, by applying to the Court for an order for payment out of Court of the amount of costs; or (b) if the property

has been bailed, by giving notice to the sureties to the bail bond that payment will be required of them. Where the damages and costs exceed the amount of bail, and bail has been given for the full value of the property, the defendants may be made personally liable for the costs (*The Volant*, 1842, 1 Rob. W. 385; *The Temiscouata*, 1855, 2 Sp. Eccl. & Adm. 208; *The Dictator*, [1892] Prob. 304). The former practice of the Admiralty Court was not to allow a ship to be re-arrested for damages or costs where the amount of her bail fell short of the full liability, unless the misconduct of her owner had put the plaintiff to unnecessary costs (Williams and Bruce, 479); but since the Admiralty Court Act, 1861 (which provided that all decrees or orders of the Admiralty Court, whereby any sum of money, or costs, charges, or expenses, should be payable to any person, should have the same effect as judgments of the common law Courts, and that all powers of enforcing judgments possessed by the common law Courts with respect to matters depending in the same Courts, as well against the ships and goods arrested as against the person of the principal debtor, were to be possessed in like manner by persons to whom such orders ordered moneys, costs, etc. to be paid (s. 15); and by sec. 22 gave the Admiralty Court judge power to issue any new writ or process necessary to enforce the Act), in a case where a foreign ship had been released on bail, and the bail fell short of the damages and costs, the Court ordered the vessel to be re-arrested for payment of the costs (*The Freedom*, 1871, L. R. 3 Ad. & Ec. 495). This power is preserved by the Admiralty Division, though these sections have been repealed (Stat. Law Rev. Act, 1881, 44 & 45 Vict. c. 59). Where costs are not paid by a party personally liable for them, they may be enforced by writ of *faci facias* or *elegit* (Admiralty Court Act, s. 15; Order 42, rr. 17 and 18). Generally all the suitors condemned in costs are severally liable for the whole (*The Leda*, 1863, 32 L. J. Ad. 58); but under the old practice the Court could grant an order for payment of costs in the first instance against one of the parties only, e.g. in a salvage suit where the salvaging owners master and crew were condemned in costs, against the owners only (*The Wilhelmina*, 1843, 2 N. C. 218). See Williams and Bruce, 479-481. As to SECURITY FOR COSTS, see that heading.

(4) *Costs in Particular Actions and Appeals*.—The following is a short summary of the rules as to costs of particular actions.

Bottomry.—Costs generally follow the result of the action (*The Onward*, 1873, L. R. 4 Ad. & Ec. 38); but cargo owners cannot be made liable for the costs of the proceedings unless they contest the validity of the bond and fail (*The Nostra Senora del Carmine*, 1854, 1 Sp. Eccl. & Adm. 305).

Damage.—Where both ships are to blame, each party bears his own costs, whether the suit be brought by the shipowner or cargo owner, or the master and crew, whether there is or is not a counter-claim (*The Washington*, 1841, 5 Jur. 1067; *The Love Bird*, 1881, 6 P. D. 80). Where the collision is caused by inevitable accident, the former practice was that no costs were given (*The Itinerant*, 1844, 2 Rob. W. 236; *The Ebenezer*, 1843, *ibid.* 206; *The Buckheerst*, 1881, 6 P. D. 152), unless the Court thought that the plaintiff should have known that it was an inevitable accident, when it might condemn him in costs (*The London*, 1863, B. & L. 83). But since the Judicature Act the Admiralty Division is bound to follow the uniform practice of the High Court, that "costs follow the event in the absence of special circumstances" (Lord Esher, M. R., *The Monkseaton*, 1889, 14 P. D. 51); and a defendant succeeding in a defence of inevitable accident is entitled to costs (*The Batavier*, 1889, 15 P. D. 37), especially when the plaintiff admits this in his

•pleadings (*The Naples*, 1886, 11 P. D. 124); unless the defendant tells an untruthful story, and so affects the conduct of the plaintiff (*The Batavier*, above).

Where both ships are to blame, but one is in charge of a compulsory pilot, and sets up that as her sole defence, and succeeds on it, she gets her costs (*The Juno*, 1876, 1 P. D. 135); but if she sets up a defence on the merits too, and fails on that, while succeeding on the former plea, each party bears his own costs (*The Schwan*, 1874, L. R. 4 Ad. & Ec. 187; *The Daisy*, 1877, 3 Asp. 377; *The Matthew Croy*, 1879, 5 P. D. 49). If, upon such a defence being pleaded, the plaintiff discontinues his action, he must pay the defendant's costs (*The J. H. Henkes*, 1887, 12 P. D. 106). Where both ships were to blame, and the plaintiff admitted his fault, but the defendant continued the action in order to get the plaintiff held alone to blame, the defendant had to pay the costs (*The General Gordon*, 1890, 6 Asp. 533).

Where the plaintiff is alone to blame, the suit is generally dismissed with costs (*The Ligo*, 1831, 2 Hag. Adm. 360); and if there is a counter-claim it will be pronounced for, and the defendant given the costs of the action. If the defendant is alone to blame, the plaintiff gets judgment for his damages and costs; and if the defendant, though alone to blame, is in charge of a compulsory pilot, and has made a counter-claim, the plaintiff is entitled to have it dismissed with costs, and the suit dismissed without costs (*The Ruby*, 1890, 15 P. D. 139).

Where a barge, while in tow of a tug, was damaged by collision with a steamer, and sued both tug and steamer for damages, and the steamer was found alone to blame, she alleging that the collision was due to the negligence of the tug, the steamer was held bound to pay the costs of the steamer as well as the tug (*The River Lagan*, 1888, 6 Asp. 281).

Damage to Cargo.—Costs generally follow the event (*The Heinrich*, 1871, L. R. 3 Ad. & Ec. 424; *The Patua*, 1871, *ibid.* 436).

Salvage.—The costs in salvage usually, under the old practice, followed the sentence of the Court, except that this rule was not strictly enforced against unsuccessful plaintiffs in salvage suits, "the main consideration on which such indulgence is shown being the expediency of encouraging the exertions of salvors in the rescue and preservation of property embarked upon the seas" (Dr. Lushington, *The Princess Alice*, 1849, 3 Rob. W. 143), and "there being in the very nature of salvage services something so loose and indefinite" (*ibid.* *The William*, 1847, 5 N. C. 110). Thus the Court has sometimes given salvage claimants their costs, though awarding them no salvage (*The Francis and Eliza*, 1816, 2 Dod. 115, and *The Vine*, 1825, 2 Hag. Adm. 1, Lord Stowell; *The Ranger*, 1845, 9 Jur. 119); and it has often dismissed a salvage suit and made no order as to costs (*The Upnor*, 1826, 2 Hag. Adm. 3; *The Mulgrave*, 1827, *ibid.* 77; *The Zephyr*, *ibid.* 48; *The Funchal*, 1837, 3 Hag. Adm. 386); but to do this there must have been circumstances inducing the Court to be indulgent, and, failing such, salvage claimants have had to pay full costs (*The Nymph*, 1861, 5 L. T. 365; *The Edward Hawkins*, 1862, Lush. 515; *The Lady Egidia*, *ibid.* 513), or a fixed sum *nomine expensarum* (*The Henrietta*, 1837, 3 Hag. Adm. 345 *n.*). Even where the plaintiffs were held to have performed salvage service, misconduct on their part would deprive them of all or part of their costs (*The Joseph Harvey*, 1799, 1 Rob. C. 306; *The Giacomo*, 1836, 3 Hag. Adm. 345; *The Susannah*, *ibid.* *n.*; *The Duke of Manchester*, 1846, 10 Jur. 865; *The Glory*, 1850, 14 Jur. 678, two-thirds costs only allowed); or they would receive only a fixed sum *nomine expensarum* (*The Glasgow Packet*, 1844, 2 Rob. W. 306), or have such a sum deducted from their award (*The Hestia*, [1895]

Prob. 193); but even where misconduct (not wilful) of salvors diminishes their reward, the Court may order their costs to be paid (*The Magdalen*, 1862, 5 L. T. 807).

Where a salvage agreement is set aside as inequitable, but the defendants have made no tender, the Court may award a substantial sum to the salvors, and yet make no order as to costs (*The Medina*, 1876, 2 P. D. 7; *The Silesia*, 1880, 5 P. D. 186). Where a tender has been made, the ordinary rule applying to proceedings after tender was not strictly applied in salvage; if the tender were sufficient in the judgment of the Court, though reasonably not so in the minds of the salvors, they were not readily condemned in costs (*The William*, 1847, 5 N. C. 110; *The Hopewell*, 1855, 2 Sp. Eccl. & Adm. 249; *The Lotus*, 1882, 7 P. D. 199, where "the tender was adequate though not liberal," per Sir R. Phillimore); but they might be refused costs in such a case (*The Sovereign*, 1860, 29 L. J. Ad. 113). But if after a sufficient tender the salvors persisted in an exorbitant claim, they made themselves liable to costs (*The Emu*, 1837, 1 Rob. W. 16, "where the tender is pronounced for and held to be amply sufficient, I shall always give costs," Dr. Lushington; *The Batavier*, 1853, 1 Sp. Eccl. & Adm. 169; *The Hedwig*, *ibid.* 19; *The Paris*, 1854, *ibid.* 289; *Cargo ex Honor*, 1866, L. R. 1 Ad. & Ec. 89 and 92; *The Waverley*, 1871, 3 *ibid.* 369 and 381); and these rules of practice are followed in the Admiralty Division, though the Court has an absolute discretion over costs (*The Medina*, *ante*; *The Lotus*, *ante*; *The Jacob Landstrom*, 1878, 4 P. D. 191; *The W. Symington*, 1884, 10 P. D. 1).

When the ship and cargo are sued in salvage, the costs must be borne rateably by them (*The Marquis of Huntley*, 1835, 3 Hag. Adm. 249; *The Peace*, 1850, Swa. Ad. 115; *The Elton*, [1891] Prob. 265). If there are separate sets of salvors with separate interests, the plaintiffs in each action may be entitled to their costs (*The Charles Adolphe*, 1856, Swa. Ad. 156; *The Perla*, 1857, *ibid.* 232); but if separate actions are brought unnecessarily instead of being consolidated, the Court may allow only one set of costs for the whole (*The Nicolina*, 1843, 2 Rob. W. 175, half costs given to two sets of plaintiffs belonging to the same ship; *The Bartley*, 1857, Swa. Ad. 199, £25 taxed costs deducted from one party; *The Pasithea*, 1879, 5 P. D. 5, only one set of costs paid, to be apportioned between the plaintiffs in the two actions, according to the amounts of their respective bills of costs); and where separate salvage actions against the same ship were consolidated, and the various plaintiffs appeared separately having conflicting interests, and the defendants tendered one sum of money, without apportioning it, to satisfy all the claims, the Court upheld the tender as sufficient, and ordered all the parties to bear their own costs subsequent to the tender, the defendants paying those previous to it (*The Lee*, 1889, 6 Asp. 395).

Towage.—The general rule applies. Where in a towage suit the Court upheld a tender made by the defendants, the plaintiffs were condemned in all costs in the action incurred subsequently to the tender (*The Hjemmet*, 1880, 5 P. D. 227); but if both ships are careless, no costs may be given (cp. *The Energy*, 1870, L. R. 3 Ad. & Ec. 48, action for damage).

Wages.—The general rule applies; but if the claim is very exorbitant, the plaintiff may have his costs disallowed; and in practice, where a master's claim is much reduced at the reference, his costs may be disallowed, or he may have to pay the costs of the reference (*The Lemuella*, 1860, Lush. 147; *The William*, 1861, *ibid.* 199; *The Fleur de Lis*, 1866, L. R. 1 Ad. & Ec. 49; *The James Seddon*, *ibid.* 62; *The Roebuck*, 1874, 2 Asp. 387). If the master has not before the suit rendered an account to his owners, the Court will not generally give him his costs (*The Fleur de Lis*, above).

Necessaries.—The general rule applies (*The Aaltje Willemina*, 1866, L. R. 1 Ad. & Ec. 107).

Limitation of Liability.—The plaintiffs, “as a general rule in an action for limitation of liability, are liable to pay the costs of the proceedings,” but if the defendants raise unnecessary issues unsuccessfully they are entitled to the costs of these issues, and are not liable for costs caused by a dispute between rival claimants to the fund in Court (*The Empusa*, 1879, 5 P. D. 6, Sir R. Phillimore).

Mortgage.—The general rule applies; and a second mortgagee who arrests a ship in order to enforce his mortgage when she is in possession of a first mortgagee, who has to give bail for her, is liable to pay the latter's costs and interest on the bail (*The Western Ocean*, 1870, L. R. 3 Ad. & Ec. 38). Mortgagee's costs in mortgage suit are taxed as between party and party (according to the Chancery practice), and not as between solicitor and client, under a decree made by consent for payment of “all costs, charges, and expenses properly incurred” (*The Kestrel*, 1866, L. R. 1 Ad. & Ec. 78).

Possession.—The general rule applies (*The Eastern Belle*, 1875, 33 L. T. 214).

Appeals.—In appeals to the Court of Appeal (and the House of Lords), where the appellant succeeds in getting the decision reversed, he gets the costs of the appeal (*The City of Berlin*, 1877, 2 P. D. 187, where a salvage award of £2000 was increased to £4000; *The Batavier*, 1889, 15 P. D. 37, where a collision was held in the Admiralty Court to be due to the fault of the defendant ship, and on appeal to be an inevitable accident). Where the appeal fails, the appellant generally pays costs (*The Lauretta*, 1879, 4 P. D. 25, collision; *The City of Manchester*, 1880, 5 *ibid.* 221, collision; *The Pontida*, 1884, 9 *ibid.* 177, bottomry). In salvage appeals, the Privy Council practice (when it was the Appellate Court in Admiralty causes) was to make no order as to costs where the appellant had succeeded in an appeal as to the amount of salvage given in the Admiralty Court, certainly where that amount was reduced on appeal (*The Chetah*, 1868, L. R. 2 P. C. 205, amount reduced by more than one-half; *The Amerique*, 1874, L. R. 6 P. C. 468, a reduction of two-fifths); and this is still the practice in appeals to the Privy Council from Colonial Vice-Admiralty Courts (*The De Bay*, 1883, 8 App. Cas. 559, a reduction of one-quarter; *The Thomas Allen*, 1886, 12 App. Cas. 118, a reduction of more than one-third); and is now adopted in the Court of Appeal (*The Gipsy Queen*, [1895] Prob. 176, a reduction of one-third). Where the amount of salvage is increased on appeal, the appellant gets his costs (*The City of Berlin*, above, amount doubled). In damage appeals, where the Admiralty Court has found one ship alone to blame, and the Court of Appeal holds both to blame, the settled rule is for both ships to bear their own costs both below and above (*The Melanesia*, 1880, 43 L. T. 107; *The Rigsborg Minde*, 1883, 8 P. D. 132; *The Hector*, *ibid.* 218; *The Margaret*, 1884, 9 *ibid.* 51; *The Beryl*, *ibid.* 144); even though the appellant ship establishes on appeal that her only fault is that of a compulsory pilot (*The Hector*, above). Where the Court below holds both ships to blame, and on appeal that judgment is affirmed, the appeal is dismissed with costs (*The City of Manchester*, 1880, 5 P. D. 221; *The Dunelm*, 1884, 9 *ibid.* 175). Where the Admiralty Court holds one ship (or both) to blame, and on appeal the collision is held to be due to inevitable accident, the Privy Council practice was to dismiss the suit without costs (*The Marpesia*, 1872, L. R. 4 P. C. 212); but the rule in the Court of Appeal is to apply the ordinary rule, that “the party who is successful obtains his costs, and the party who loses pays them,” and “in the absence

of special circumstances costs follow the event" (*The Condor*, 1879, 4 P. D. 115; *The Monkseaton*, 1889, 14 P. D. 51; *The Batavier*, *ibid.*, 15 *ibid.* 37).

In appeals to the Admiralty Division from inferior Courts, such as County Courts or tribunals holding investigations into the conduct of masters or mariners, costs usually follow the event, though the Court has full discretion as to them. As regards County Courts, the County Courts Admiralty Act, 1868 (s. 30), provides that when an appellant is unsuccessful on an appeal he shall pay the costs of appeal, unless the appellate Court otherwise directs. As regards other tribunals which have cancelled or suspended the certificate of a master or mariner, if the action of the Court below proceed on the invitation of the Board of Trade, which appears on the appeal, and the master or mariner is successful on an appeal, costs may be given against the Board of Trade (*The Arizona*, 1880, 5 P. D. 123; *The Famenoth*, 1882, 7 P. D. 207); if the appellant fails, the appeal will be dismissed with costs (*The Golden Sea*, 1882, 7 P. D. 194); and if the appeal is partly successful, both parties may be left to bear their own costs (*The Kestrel*, 1881, 6 P. D. 182, where the decision of the Court below was affirmed, but the time of suspension of the appellant's certificate was shortened).

References.—The costs of references are in the discretion of the Court, and do not necessarily follow the event of the action (*The Consett*, 1880, 5 P. D. 77, where the owners of a ship and the owners of cargo on board her sued another ship for collision, and both were held to blame, the Court gave the cargo owners the costs of the reference; *The Savernake*, *ibid.* 167, where both ships were to blame, and one was given the costs of the reference).

If the registrar makes no report as to costs, they must be moved for (*The Mary*, 1882, 7 P. D. 201).

In damage causes the usual method for the exercise of the Court's discretion is this: a claimant is usually allowed his costs of the reference if not more than one-fourth has been struck off his claim or counter-claim; if more than one-fourth, and less than one-third, has been struck off the claim, each party bears his own costs; if one-third has been struck off, the claimant pays the other party's costs (*The Empress Eugénie*, 1860, Lush. 138); but there is no hard-and-fast rule, and "since the judge of the Admiralty Court must exercise his discretion in every case, it is wrong to say that there is any rule by which he can be bound" (Brett, M. R., *The Friedeberg*, 1885, 10 P. D. 112, where more than one-third of the plaintiff's claim had been struck off, and both sides had to bear their own costs of the reference). This rule of practice never applied to bottomry or master's wages references.

Where objection is made to the registrar's report to the Court, if the objection be upheld, the Court generally allows the objecting party his costs (*The Black Prince*, 1862, Lush. 577); but not if several of his objections except one are overruled (*The Hebe*, 1847, 2 Rob. W. 530, each party bearing his own costs). If the report is confirmed, the costs follow the event, except where the objections raise questions of difficulty deserving of the attention of the Court, when each party will bear his own costs (*The Clyde*, Swa. Ad. 23).

[*Authorities.*—See Williams and Bruce, *Admiralty Practice*; Roscoe, *ibid.*]

IV. COSTS IN THE COURT OF APPEAL.

In the Court of Appeal the general rule is that the successful party is entitled to his costs (*Memorandum*, 1875, 1 Ch. D. 41; *The Batavier*, 1889,

15th P. D. 37). This is so in Admiralty appeals (*The Batarier*), Palatine appeals (*Anderson v. Welsby*, W. N., 1876, 230), and appeals from County Courts in bankruptcy (*Ex parte Masters*, 1875, 1 Ch. D. 113). But the Court has full discretion over the cost of any appeal, and can make such order as to the whole or any part of such costs as may be just (Order 58, r. 4; Judicature Act, 1890, s. 5). Hence it will in a proper case refuse costs to the successful party. Thus an appellant was deprived of his costs where he succeeded on a point not raised in the Court below (*Hussey v. Horne-Payne*, 1878, 8 Ch. D. 670; *Dye v. Dye*, 1884, 13 Q. B. D. 147), or on fresh evidence (*Arnot's case*, 1887, 36 Ch. D. 702; *Chard v. Jervis*, 1882, 9 Q. B. D. 178; *Ex parte Hauxwell*, 1883, 23 Ch. D. 626), or on a mere point of law, having failed in proving allegations of fraud (*Ex parte Cooper*, *In re Baum*, 1878, 10 Ch. D. 313).

Where the appellants were innocent persons who had used due diligence, but had been made the victims of a forgery, their appeal was dismissed without costs (*Cooper v. Vesey*, 1882, 20 Ch. D. 611). But the mere omission by a respondent to inform the other side that he has a preliminary objection (which proves fatal) to the appeal, is not a sufficient reason for depriving him of costs (*Ex parte Shead*, *In re Mundy*, 1885, 15 Q. B. D. 338), though this has been done in some instances (*In re Speight*, 1884, 13 Q. B. D. 42; *Ex parte Blease*, 1884, 14 Q. B. D. 123; *In re Blyth and Young*, 1880, 13 Ch. D. 416).

A party served with notice of an appeal is *prima facie* entitled to attend the hearing, and, if the appeal fails, to be paid his costs; but not where his attendance is obviously unnecessary and useless (*Ex parte Webster*, 1882, 22 Ch. D. 136; see, however, *In re New Callao*, *ibid.* 484).

If a respondent desires to contend on the hearing of the appeal that the decision below should be varied, he should give notice of his intention to the appellant; his omission to give such a notice will be ground in the discretion of the Court of Appeal for an adjournment, or for a special order as to costs (Order 58, rr. 6, 7). A respondent who has given such a notice is in the same position as to costs as if he had presented a cross appeal (*Harrison v. Cornwall Minerals Ry. Co.*, 1881, 18 Ch. D. 334; *Robinson v. Drakes*, 1883, 23 Ch. D. 98). If one of two respondents gives such a notice and fails, the costs will in a proper case be apportioned (*ibid.*).

Where an appeal has been abandoned, it will, on the application of the respondent, be dismissed though not set down (*Charlton v. Charlton*, 1881, 16 Ch. D. 273), but notice of the application must be given to the appellant (*Ormerod v. Bleasdale*, 1886, 54 L. T. 343); and payment of the costs should be demanded before the application is made (*Griffin v. Allen*, 1879, 11 Ch. D. 913).

The costs of an appeal will include the costs of shorthand notes of the judgment of the Court below, and there is no need therefore for a successful appellant to ask for them (*In re Medland*, 1889, 41 Ch. D. 476; *Humphery v. Sumner*, 1886, 55 L. T. 649; *In re Morgan*, 1887, 35 Ch. D. 492; *Pilling v. Joint Stock Institute Ltd.*, 1895, 73 L. T. 570; but see *Andrew v. Mockford*, 1896, 12 T. L. R. 175).

The costs of shorthand notes of the evidence below are only allowed where a very special case is made for allowing them (*In re Duchess of Westminster Co.*, 1878, 10 Ch. D. 307; *Vernon v. Vestry of St. James, Westminster*, 1880, 16 Ch. D. p. 473), and an application for their allowance ought to be made when judgment is delivered (*Glasier v. Rolls*, 1889, 38 W. R. p. 116).

Any party printing evidence for the purpose of an appeal without an

order of the Court below or the Court of Appeal, pays the costs thereof, unless otherwise ordered (Order 58, r. 12).

Costs when a New Trial is ordered.—The costs of the first trial abide the event of the second, unless any special order be made when the new trial is granted or at the second trial (*Green v. Wright*, 1877, 2 C. P. D. 354; *Field v. Great Northern Ry. Co.*, 1878, 3 Ex. D. 261). And by "the event" of the second trial is meant the result of that trial as to costs (*Brotherton v. Metropolitan District Ry. Joint Committee*, [1894] 1 Q. B. 666).

[*Authorities.*—See list of authorities appended to I. and II., *supra*, pp. 474, 481.]

V. COSTS IN THE HOUSE OF LORDS, AND THE PRIVY COUNCIL

On an appeal to the House of Lords the House has full power to deal both with the costs of the appeal and also with the costs below (*Den. and Scott, House of Lords Practice*, p. 142; *Guardians of West Ham v. Churchwardens, etc., of St. Matthew, Bethnal Green*, [1896] App. Cas. 477). The general rule is that they follow the event; consequently the appellant, if successful, will have his costs, including the costs of the appeal (*Bowes v. Shand*, 1877, 2 App. Cas. pp. 472, 485); while, if the appeal fails, the dismissal will be with costs (*Stewart v. Menzies*, 1841, 8 Cl. & Fin. 309; *Aaron's Reefs Limited v. Twiss*, [1896] App. Cas. 273). If the House is equally divided the practical effect is that the appeal fails, but without any order being made as to costs (see *Pryce v. Monmouthshire Canal and Railway Co.*, 1879, 4 App. Cas. 197, 219, where the practice is explained by Earl Cairns, L.C.). Under special circumstances, however, *e.g.* where the successful party has been guilty of misconduct (*Singer Manufacturing Co. v. Loog*, 1882, 8 App. Cas. 15), or of conduct which rendered litigation necessary (*Paterson v. Provost of St. Andrews*, 1881, 6 App. Cas. 833), or where there is great difference of opinion in the House (*Dublin Railway Co. v. Slattery*, 1878, 3 App. Cas. 1155), or the case is one of considerable hardship (*Maddison v. Alderson*, 1883, 8 App. Cas. 467), or the appellant has succeeded on one point only out of many, the others being abandoned at the hearing (*Elliot v. Lord Rokeby*, 1881, 7 App. Cas. 43), the successful party may be deprived of his costs either wholly or in part. Where there is a fund or estate in litigation, the costs of an unsuccessful appellant may be allowed out of such fund or estate (*Prendergast v. Prendergast*, 1850, 3 H. L. 195, 225; and see *Charter v. Charter*, 1874, L. R. 7 H. L. 364; *Singleton v. Tomlinson*, 1878, 3 App. Cas. 404).

Where the judgment appealed from is partly affirmed and partly reversed, the practice is to give no costs of the appeal (*Torre v. Browne*, 1855, 5 H. L. 555); but if it is substantially affirmed and varied only in its details, the appeal will be dismissed with costs (*Wallace v. Patton*, 1846, 12 Cl. & Fin. 491).

As to the security required on an appeal to the House of Lords, see SECURITY FOR COSTS, and references in article APPEALS, vol. i. p. 272.

Costs in the Privy Council.—On an appeal to the judicial committee of the Privy Council, the committee has full power over the costs of the appeal and also over the costs in the Court below (6 & 7 Vict. c. 38, s. 12). A successful appellant will be entitled to receive his costs from the respondent, unless the committee otherwise orders (Order in Council, June 13, 1853); but it is usual to ask for the costs at the hearing (*Lindo v. Barrett*, 1856, 9 Moo. P. C. C. 456). So, too, if the appeal fails, it is generally dismissed with costs. A successful appellant may, however, be

deprived of his costs for any sufficient reason, *e.g.* where he has been guilty of misconduct, or his proceedings have been dilatory or vexatious, or he has put his opponent to needless expense, or has made exorbitant claims (Macph. *Privy Council Practice*, p. 256). So the committee sometimes decline to allow costs against an unsuccessful appellant where they consider the case one in which it was proper to take their opinion, or where there was a difference of opinion in the Court below (*ibid.* p. 258). In a proper case the costs of all parties will be allowed out of the estate.

[*Authorities.*—Denison and Scott, *House of Lords Practice*, 1878; Macpherson, *Privy Council Practice*, 3rd ed.]

VI. COSTS IN LUNACY.

The costs of all proceedings for the purpose of ascertaining whether a person is lunatic (as to which, see secs. 90 and 116 of the Lunacy Act, 1890, and article LUNACY), and of all proceedings in the matter of a lunatic, are in the discretion of "the Judge in Lunacy" (a term which includes the Master in Lunacy for the purpose of proceedings with which he is competent to deal), and may be ordered to be paid by the lunatic or alleged lunatic, or charged upon and paid out of the estate or such part thereof as the judge thinks fit; and in the case of the death of the lunatic or alleged lunatic, an order may be made within six years next after the right to recover the costs has accrued (as to meaning of "accrued," see *In re Cumming*, 1860, 2 De G., F. & J. 376, and *Wilkinson v. Wilkinson*, 1851, 22 L. J. Ch. 155), and every such order is to have "the effect of an order of the High Court" (s. 109, Lunacy Act, 1890). In the exercise of the discretion conferred by this section, the judge is entitled and bound to look at the circumstances of each case, and no general rules or canons fettering the discretion of the Court have been or will be laid down. But the following considerations (cp. the judgments of Lindley, L.J., in *In re Cathcart*, [1892] 1 Ch. at pp. 558 and 561, and Lord Halsbury, L.C., S. C., [1893] 1 Ch. at p. 471) will be kept in view: (1) The reason for believing in the insanity of the alleged lunatic; (2) the reasons for believing the object of the proposed proceedings to be not only insane but incapable of managing himself or his affairs; (3) the reasons for instituting any proceedings assuming the person to be insane and incapable of managing himself and his affairs; (4) the relationship of the petitioner to the alleged lunatic, and the petitioner's objects and conduct; (5) the amount and propriety of the costs incurred. Lord Justice Lindley added to the foregoing "the respective means of the parties." But Lord Halsbury, in delivering the judgment of the Court of Appeal, said that he could not concur in considering this as a topic that ought to enter into the question. Keeping these rules in view, we may now consider the different modes in which the Court has exercised its discretion under sec. 109 of the Lunacy Act, 1890, in inquisitions.

Petitioner's Costs.—(a) *The petitioner may be allowed all his proper costs, charges, and expenses in connection with the commission, and also of the application for costs, out of the estate.* This is the course generally taken where the object of the commission is found lunatic, and the inquiry was instituted *bonâ fide* and for his benefit (cp. *Ex parte Price*, 1751, 2 Ves. at p. 407; *In re Hart*, 1852, 21 L. J. Ch. 810). In some cases, such costs have been treated as necessities supplied to the lunatic (*Williams v. Wentworth*, 1842, 5 Beav. 325; *Wentworth v. Tubb*, 1841, 1 Y. & C. C. 171; *Barnesley v. Powell*, 1750, Amb. 102; *Chester v. Rolfe*, 1853, 4 De G., M. & G. 798; *Stedman v. Hart*, 1854, Kay, 607; *In re Meares*, 1879, 10 Ch. D. 552. The same course may be adopted even where the inquiry results in a verdict that the lunatic

was of sound mind, if the petition was presented *bond fide*, and the petitioner believed, and had fair reason for believing, that the alleged lunatic was of unsound mind at the time of presenting it. (b) *Each party may be left to pay his own costs.* This course was taken in *In re Windham* (1862, 31 L. J. Ch. 720), although the Court held the case to be a proper one for inquiry. But this decision appears to have been influenced by doubt in the minds of the judges as to whether they had power to give the petitioners their costs; and it is conceived that, in a similar case now, such costs would, in whole or in part, be given. Each party may, however, be left to pay his own costs even where reasonable ground for an inquiry existed, if the petitioner instituted proceedings not of his own accord but at the instance of a solicitor (*In re E. S.*, 1876, 4 Ch. D. 301; but contrast this case with *In re C.*, 1874, L. R. 10 Ch. 75). (c) *The petitioner may be not only left to pay his own costs, but ordered to pay those of the alleged lunatic.* This alternative may be adopted where the petitioner is guilty of misconduct in regard to either the alleged lunatic or the inquiry (*In re Anon.*, 1740, 2 Atk. 52), or where the petition is unnecessary and vexatious (*In re Clare*, 1846, 3 Jo. & Lat. 571), or where the proceedings are taken for the petitioner's benefit, e.g. to enable him to complete a transaction arrested by the alleged lunacy (*Ex parte Tutin*, 1814, 3 Ves. & Bea. 149). (d) *The petitioner may be allowed such a proportion of his costs as the Court thinks fit out of the alleged lunatic's estate.* This alternative may be taken where either the petitioner—while justified in instituting proceedings—has placed himself in a hostile attitude towards the alleged lunatic, or there has been no attempt on his part to keep down expense. In such cases the Court may not only limit the amount of the costs he is to recover, but direct them to be taxed as between party and party, and not as between solicitor and client, or upon the principle adopted in the Chancery Division, where costs come out of the estate (*In re Catheart*, [1892] 1 Ch. 549, 564; affirmed, [1893] 1 Ch. 466).

Alleged Lunatic's Costs.—The costs incurred by the alleged lunatic in opposing an inquisition will generally be allowed out of the estate (*In re Knight*, 1832, Shelford's *Lunacy*, 133, 134; *In re Taylor*, 1841, *ibid.*; *In re Norris*, *ibid.*). As the alleged lunatic has a right to employ a solicitor to defend him at an inquiry, the costs properly so incurred are a debt due from the lunatic to the solicitor (*Williams v. Wentworth*, *supra*), and the Court may sanction the payment of a sum of money to the alleged lunatic's solicitor for the purpose of preparing his defence to an inquiry (*In re Bullock*, 1886, 35 W. R. 109), and such costs will be allowed as between solicitor and client on the scale allowed for work and labour of a similar character in the Chancery Division (Rules in *Lunacy*, 1892, r. 112), unless the Court sees that there was something unfair or frivolous or needlessly litigious in the proceedings (*Wentworth v. Tubb*, *supra*; *Field v. Tarnier*, 1855, 3 W. R. 469). No allowance will be made for refreshments during inquisitions (R. L., 1892, r. 113).

Costs of Third Parties.—Third parties attending an inquiry, by leave of the Court, have sometimes been allowed their costs out of the estate (*In re Portsmouth*, 1823, Shelf. *Lun.* 134). If third parties vexatiously oppose the grant of a commission which is absolutely necessary for the protection of the lunatic, the Court may compel them to pay the costs incurred by such opposition (*In re Smith*, 1826, 1 Russ. 348; *In re George Armstrong & Sons*, [1896] 1 Ch. 536). A solicitor who reasonably and in good faith, believing a client to be of sound mind, institutes proceedings on his behalf, and obtains an order for him on an *ex parte* application, without disclosing the

fact that a petition in lunacy is pending against him, is not guilty of such professional misconduct as to make him liable for the costs on its being discharged (*In re George Armstrong & Sons, supra*; but see *Geilinger v. Gibbs*, [1897] 1 Ch. 479).

Mutatis mutandis, the rules above stated as to the considerations governing the exercise by the Court of its discretion under sec. 109, and the modes in which such discretion may be exercised, apply to traverse and supersedeas (as to which, see article LUNACY).

The words "all proceedings in the matter of a lunatic" in sec. 109, *supra*, include attendances on the Master, on appointment of committees, the bringing in of proposals, etc. Charges and expenses of this description are not, however, allowed, except to committees of the estate or person, unless under special circumstances the judge or Master directs them to be so allowed (R. L., 1892, r. 114). Costs in lunacy are taxed by and under the direction of the Master (r. 114), and, subject to the Rules in Lunacy, the Rules of the Supreme Court for the time being in force as to costs apply (r. 110). As to procedure on taxation of costs, see r. 115, R. L., 1892. Payment of costs may be enforced by subpoena (2 Dan. Ch. Pr. 1262), or by writ of *fi. fa.* or *elegit* (*ibid.*), or by committal under the Debtors Act, 1869 (*Hewitson v. Sherwin*, 1870, L. R. 10 Eq. 53). An appeal lies to the Court of Appeal without leave against any order under sec. 109 (*In re Cathcart*, [1893] 1 Ch. 466). As to procedure when a lunatic dies before his property has been brought under the control of the Court, see *In re Popham*, 1881, 29 W. R. 403. An order may be made for the payment of costs out of capital where the allowance for maintenance has been settled (*In re Knight*, 1832, Shelf. Lun. 133 n. (c); *Stedman v. Hart*, 1854, Kay, 607). Where costs have been ordered to be paid out of the estate, the application for taxation and payment should be made in the lunacy, and the Judge in Lunacy may restrain proceedings in other Courts (*Jones v. Bywater*, 1832, 2 Tyrw. 402; *In re Weaver*, 1837, 2 Myl. & Cr. 441), and other Courts will take judicial notice of the fact (*Stedman v. Hart, supra*). As to (1) recovery of expenses in connection with pauper lunatics, see article ASYLUMS, vol. i. p. 390; (2) costs of *habeas corpus* for release of lunatic, see *ibid.* at p. 380; (3) of judicial dissolution of partnership on the ground of insanity, see *Jones v. Welch*, 1855, 1 Kay & J. 765; (4) of propounding will or resisting probate, see p. 481. The Judge in Lunacy may order the costs of and incident to the obtaining or carrying into effect of vesting orders to be paid out of the land or personal estate or income thereof, or as he thinks fit (s. 342, Lunacy Act, 1890). For the cases under this section, see Lewin on *Trusts*, 9th ed., p. 1177 n. (b), and Wood Renton on *Lunacy*, 461, 462. As to the scale fee for costs in the case of a lease at rack-rent of a lunatic's property, see *In re McGarel*, [1897] 1 Ch. 400.

[*Authorities.*—On the whole subject of costs in lunacy, see Elmer on *Lunacy*, 1892; Pope on *Lunacy*, 1892; Archbold, *Lunacy*, 1894; Wood Renton on *Lunacy*, 1896; Johnson on *Bills of Costs*, 1897.]

VII. APPEALS FOR COSTS.

By sec. 49 of the Judicature Act, 1873, 36 & 37 Vict. c. 66, no order made by the High Court of Justice, or any judge thereof, as to costs only, which by law are left to the discretion of the Court, is subject to any appeal, except by leave of the Court or judge making such order.

The Act applies to divorce appeals (*Russell v. Russell*, [1892] Prob. 152; *Butler v. Butler*, 1890, 15 P. D. 126), and to an order of a judge at chambers as to costs in an interpleader issue (*Harpmont v. Foster*, 1881,

8 Q. B. D. 82), but not to an order as to costs made by a Master in the Queen's Bench Division or a district registrar (*Foster v. Edwards*, 1879, 48 L. J. Q. B. 767).

It often happens, however, that a decision which in form affects costs only, is really a decision on the merits of the case, or on some matter of principle, or implies that one of the parties has been guilty of misconduct. In these cases an appeal is allowed; e.g. where a trustee (*Cotterell v. Stratton*, 1872, L. R. 8 Ch. 295; *In re Chennell*, 1878, 8 Ch. D. 492; *Turner v. Hancock*, 1882, 20 Ch. D. 303; *In re Isaac*, [1897] 1 Ch. 251), or mortgagee (*Cotterell v. Stratton*, *supra*; *Charles v. Jones*, 1886, 33 Ch. D. 80, explained in *In re Beddoe*, [1893] 1 Ch. 555); or an official liquidator (*In re Silver Valley Mines*, 1882, 21 Ch. D. 381) is refused costs. So where a solicitor is ordered to pay costs personally (*In re Bradford*, 1883, 15 Q. B. D. 635). "Where the judge's jurisdiction over costs depends upon the existence of some breach of an injunction, or misconduct, it seems to me that an appeal lies against his finding that there has been a breach of the injunction or misconduct, even although he only inflicts costs. Such a case is not, I think, within Order 65, r. 1. It really is an appeal against the finding by means of which the judge clothes himself with the jurisdiction to inflict costs" (per Bowen, L.J., in *Stevens v. Metropolitan District Rwy. Co.*, 1885, 29 Ch. D. at p. 73; and see *Witt v. Corcoran*, 1876, 2 Ch. D. 69; *In re Bradford*, *supra*). Thus, if at the trial the Court simply orders the defendant to pay the costs of the action, an appeal will lie; for such an order could not have been made without in effect deciding that the plaintiff had a good cause of action, and that is therefore the real question involved in the appeal (*Dicks v. Yates*, 1881, 18 Ch. D. 76).

If an appeal fails on the merits, the judgment or order will not be varied as to costs, for this would practically be allowing an appeal for costs only (*Harpham v. Shacklock*, 1881, 19 Ch. D. p. 215). Even when leave to appeal has been given, the Court of Appeal (as in other cases of discretion) will not interfere with the decision of the judge below, unless he has gone manifestly wrong (*Gilbert v. Hudlestone*, 1885, 28 Ch. D. 549; *Young v. Thomas*, [1892] 2 Ch. 134).

If a judge who has tried an action in the Queen's Bench Division with a jury makes a special order under Order 65, r. 1, depriving the successful party of costs, an appeal lies on the question whether any good cause existed, enabling him to make such an order. For this is not an appeal as to costs, but as to his jurisdiction to make an order affecting the costs (*Jones v. Curling*, 1884, 13 Q. B. D. 262; *Huxley v. West London Extension Rwy. Co.*, 1889, 14 App. Cas. 26).

[*Authorities*.—See lists appended to divisions I., II., IV., V., *supra*, pp. 474, 481, 506, 507.]

VIII. COSTS IN INFERIOR COURTS.

1. *Costs in City and Borough Courts*.—A rule similar to Order 65, r. 1, prevails in the Mayor's Court of London (see the rules of that Court made in 1892, Order 8, r. 1), Liverpool Court of Passage (*King v. Hawkesworth*, 1879, 4 Q. B. D. 371), in the Salford Hundred Court of Record (*Turner v. Heyland*, 1879, 4 C. P. D. 432), and in most of the Borough Courts. But if any action is brought in a Borough Court which could have been brought in a County Court, and the verdict recovered is for a less sum than £10, the plaintiff cannot recover a greater amount of costs than he would have been allowed if the action had been brought in a County Court (County Courts Act, 1888, s. 117). And the judge of the

Borough Court has no power to certify that there was sufficient reason for bringing the action in his Court, unless possibly such a power is conferred on him by some special Act relating to his Court. There are special Acts governing the procedure of the Mayor's Court of London, the Liverpool Court of Passage, the Salford Hundred Court of Record, and the Court of the Chancellor of the University of Oxford.

2. *Costs in the County Court.*—The judge of a County Court has full discretion over the costs of the action, whether the action be tried with a jury or not; he is not restricted by any provision as to "good cause." In the absence of any direction by the judge, the costs will follow the event. Application should, however, be made to him as soon as he has delivered judgment for any special items, such as a fee to counsel for advising on evidence, an extra fee to counsel on his brief, or special allowances to expert or scientific witnesses. But the judge has not the same unfettered power to decide on what scale the costs which he awards shall be taxed. There are clear and precise rules in the County Court as to the scale according to which the costs are to be taxed; and no variation is, as a rule, allowed from the method thus prescribed, unless the judge certifies in writing that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest (County Courts Act, 1888, s. 119). But see County Court Orders, 50 *a*, rr. 9 and 14.

3. *Costs of a Remitted Action.*—If an action be commenced in the High Court, and subsequently remitted to a County Court, under either sec. 65 or sec. 66 of the County Courts Act, 1888, "the action and all proceedings therein shall be tried and taken in such Court as if the action had originally been commenced therein." It follows that the High Court has no jurisdiction to make any order as to the costs of such an action (*Moody v. Steward*, 1870, L. R. 6 Ex. 35; *Harris & Sons v. Judge*, [1892] 2 Q. B. 565); and that the power of the County Court judge over costs is regulated by sec. 113 of the County Courts Act, 1888, and not by the Rules of the Supreme Court, that is to say, he has absolute discretion over the costs of the action, whether it be tried by a jury or not. In the absence of any special direction, the costs will follow the event; the costs of the proceedings in the High Court will be allowed according to the scale in use in the High Court; the costs incurred since the order to remit, according to the County Court scale.

4. *Costs in the Sheriff's Court.*—It has now been decided by the Court of Appeal that the assessment of damages by a jury before an under-sheriff, upon a writ of inquiry issuing out of the High Court, is the trial of a cause, matter, or issue in the High Court (*William Radam's Microbe Killer Co. Ltd. v. Leather*, [1892] 1 Q. B. 85). Under the County Courts Act, 1867 (30 & 31 Vict. c. 142), it was decided that an under-sheriff executing such a writ was a "judge," and had power to certify for costs as required by that Act (*Craven v. Smith*, 1869, L. R. 4 Ex. 146); although, of course, he is not "a judge of the High Court" within sec. 116 of the County Courts Act, 1888 (*Cox v. Hill*, 1892, 67 L. T. 26). Hence it would seem to follow that, in all cases outside the scope of sec. 116, the under-sheriff presiding over such an assessment of damages by a jury was "the judge by whom such action, cause, matter, or issue is tried" within the meaning of Order 65, r. 1, and had therefore power for good cause to deprive the plaintiff of his costs. If so, the decision of Field, J., at chambers, in *Gath v. Howarth*, W. N., 1884, p. 99, is no longer law.

[Authorities.—See *Annual Practice*; *Annual County Court Practice*.]

IX. COSTS IN CRIMINAL PROCEEDINGS.

At common law no provision existed empowering any Court to direct the payment, either out of public funds or by the parties, of the costs of any prosecution for a criminal offence.

The right to indemnity for costs in criminal cases rests wholly on the legislation to be now described; and it is to be noted that, from the nature of the proceedings, which are in support of public justice and for the protection of the public peace, provision is, to a large extent, made for defraying the costs of a prosecution and, to some extent, of the defence out of public funds, instead of applying the ordinary provisions of civil proceedings as to party and party costs.

1. *Summary Proceedings.*—In all proceedings for offences governed by the Summary Jurisdiction Acts, the Court of summary jurisdiction which tries the case has power in its absolute discretion to order an unsuccessful informant or defendant to pay the costs of the successful party (11 & 12 Vict. c. 43, s. 18). This power extends to proceedings to obtain an order for sureties of the peace (42 & 43 Vict. c. 49, s. 25), and also to proceedings on complaint of a civil or only quasi-criminal character (see COMPLAINT), but not to summary trials for indictable offences (same Act, s. 28).

The costs may include the expenses of witnesses as well as the fee to his solicitor or counsel (if reasonably necessary), and the Court fees, and the constable's fees. The amount must be ascertained and fixed by the justices themselves (*Sellwood v. Mount*, 1841, 1 Q. B. 726), and must be specified in the conviction or order of dismissal. There is no statutory scale of costs; but in settling them it is usual to have reference to those provided for indictable offences by the Secretary of State's Orders (Stat. Rules and Orders, Revised, vol. ii. p. 589; St. R. & O., 1895, p. 105; St. R. & O., 1896, p. 85). Nor is there any general statutory limit to the amount to be awarded. The highest order known is £300, in a long prosecution for a nuisance by brick-burning (*Bird v. Kensington Vestry*, [1895] 1 Q. B. 512). But where, on summary conviction, a fine of less than 5s. is awarded, the informant is not entitled to any costs, except under an express order of justices; but the informant is to have his Court fees remitted, and may get an order to have the whole or part of the fine applied towards his costs (42 & 43 Vict. c. 49, s. 8). In the view of the Home Office (*Glen's Summary Jurisdiction Acts*, 6th ed., Gill and Douglas, p. 123), orders for costs under this section should be made only for special reasons.

Where a charge is proved, but is dismissed as trifling, the Court may order the defendant to pay such costs as seem reasonable (42 & 43 Vict. c. 49, s. 16).

Enforcement.—The costs awarded on a conviction are part of the sum adjudged to be paid by the conviction (42 & 43 Vict. c. 49, s. 49), and are recoverable in the same way as any penalty adjudged by the conviction to be paid or recovered; or if no penalty is adjudged, then by distress and sale of the goods of the person against whom the costs are awarded, or in default of distress by imprisonment for not over a month, unless the costs are sooner paid (11 & 12 Vict. c. 43, ss. 18, 24). Costs awarded on dismissal of an information are recoverable summarily as a civil debt (42 & 43 Vict. c. 49, s. 47; *Ex parte Boaler*, [1893] 2 Q. B. 146, and see COMPLAINT), and leviable by distress against the prosecutor (11 & 12 Vict. c. 43, s. 26), but not enforceable by imprisonment.

These general provisions extend to prosecutions under Inland Revenue or Customs Acts (42 & 43 Vict. c. 49, s. 53).

• Besides these provisions, there are certain special provisions as to certain summary proceedings, which are not in strictness of a criminal character. In bastardy cases the Court can grant costs on making an order, but not on dismissing a summons (*R. v. Machen*, 1840, 15 Q. B. 78; 35 & 36 Vict. c. 65, s. 4; 42 & 43 Vict. c. 49, s. 54).

Under the Summary Jurisdiction Married Women Act, 1896, the justices, and they only, have power to make orders as to the costs of proceedings before them (58 & 59 Vict. c. 39, s. 5 (*d*); *Cale v. James*, [1897] 1 Q. B. 418), and the ordinary remedies of married women as to the costs of matrimonial suits against or by their husbands do not apply. The costs in appeals under the Act are not regulated by the practice of the Crown Office, but by that of the Matrimonial Court (*Earnshaw v. Earnshaw*, [1896] Prob. 160).

Payment out of Public Funds.—Costs incurred in summary prosecutions are payable by statute out of public funds in certain cases, *e.g.* on prosecutions by guardians of parents for desertion of or neglect to maintain their families (7 & 8 Vict. c. 101, s. 59; 28 & 29 Vict. c. 79, s. 9), and a case of summary prosecution for indictable offences (42 & 43 Vict. c. 49, s. 28); and it may be taken as a general rule that where a local authority is authorised to institute a summary proceeding it is also expressly or impliedly authorised to charge the cost to its corporate funds.

Appeals to Quarter Sessions.—The costs of appeals to Quarter Sessions for summary convictions or orders are now regulated by sec. 27 of the Summary Jurisdiction Act, 1848, and by sec. 31 (5) of the Summary Jurisdiction Act, 1879, which permits a Court of Quarter Sessions to make such order as it thinks just as to the costs of an appeal from a summary conviction or order. The order directs their payment to the clerk of the peace within a certain time (11 & 12 Vict. c. 43, s. 27), and he pays them over to the person entitled. If they are not paid within the time limited, and the person ordered to pay is not under recognisance, the clerk of the peace, on application by or on behalf of the person entitled to the costs, and for a fee of one shilling, grants a certificate of non-payment, on production of which to any justice for the same jurisdiction he can enforce this by warrant of distress. Where costs are ordered against an appellant who is under recognisance, the order is enforced, if necessary, by forfeiture and estreat of the recognisance. See RECOGNISANCE. The Act of 1848 superseded all inconsistent provisions as to such costs in prior Acts (*R. v. Hellier*, 1851, 17 Q. B. 229), but did not affect poor rate appeals (*R. v. Huntley*, 1854, 3 El. & Bl. 172).

Only part of Baines' Act (12 & 13 Vict. c. 45) applies to appeals against summary convictions (see s. 2, and 47 & 48 Vict. c. 43, s. 4). The portions relating to costs are applicable to all appeals, and incorporate the mode of enforcement under 11 & 12 Vict. c. 43, s. 27, already detailed (see 12 & 13 Vict. c. 45, s. 5); but an alternative procedure for enforcement is given by sec. 18 of 12 & 13 Vict. c. 45. The costs of criminal proceedings at Quarter Sessions otherwise than on indictment are not regulated by statute, except as above stated, and in the case of incorrigible rogues; the expenses of whose sentence at Quarter Sessions may by 5 Geo. IV. c. 83, s. 9, be paid out of the local rate.

2. *Indictable Offences.*—The first statutory authority for payment out of public funds of the costs of prosecution for felony was 27 Geo. II. c. 3, s. 3, which authorised payment, on conviction of fraud or petty larceny or other felony, of the costs of prosecution out of the county rate. By 18 Geo. III. c. 19, s. 7, this was extended to cases where the accused was acquitted, but the prosecution was properly instituted. The same Act

provided for the expenses of witnesses attending on recognisance or subpoena. The present practice as to these costs depends on the Criminal Law Act, 1826 (7 Geo. IV. c. 64). Under that Act the Court may direct the costs of the prosecution to be paid out of the local rate in the case of any felony (7 Geo. IV. c. 64, s. 21; an exception was later made as to treason felony by 11 & 12 Vict. c. 12, s. 10), and the following misdemeanours:—

* Assault with intent to commit felony, or * attempt to commit felony, * riot, * *any misdemeanour for receiving stolen property knowing it to be stolen*, * riot, * assault on a peace officer in execution of his duty, or of any person acting in his aid, * neglect or breach of duty as a peace officer, * *assault in pursuance of a conspiracy to raise the rate of wages*, * *knowingly and designedly obtaining any property by false pretences*, * wilful and corrupt perjury, or * subornation of perjury, or * wilful and indecent exposure of the person (s. 23).

To this list have been added by other legislation many other misdemeanours, namely:—

Assault on an officer of a workhouse or a relieving officer in the execution of his duty (13 & 14 Vict. c. 101, s. 9); neglect of duty by or interference with a constable in executing the Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 12); * conspiring to commit any felony except treason felony (14 & 15 Vict. c. 55, s. 2); * conspiring to charge any person with felony or to indict any person for felony (14 & 15 Vict. c. 55, s. 2); * *unlawful abduction of a girl under sixteen* (14 & 15 Vict. c. 55, s. 2); * *carnal knowledge of a girl between ten and twelve* (14 & 15 Vict. c. 55, s. 2); assaulting or offering violence to a person authorised to detain him when found committing an indictable offence in the night (14 & 15 Vict. c. 19, s. 14); indecent assault (48 & 49 Vict. c. 69, s. 18); corrupt or illegal practices at a parliamentary or municipal election (17 & 18 Vict. c. 102, ss. 10, 13; 46 & 47 Vict. c. 51, s. 53; 47 & 48 Vict. c. 70, s. 30; 51 & 52 Vict. c. 41, s. 75; 57 & 58 Vict. c. 75, s. 48); and under the following Acts:—24 & 25 Vict. c. 94, s. 8 (*accessories*); c. 96, s. 121 (*larceny, etc.*); c. 97, s. 77 (*malicious damage*); c. 98, s. 54 (*forgery, etc.*); c. 99, s. 42 (*coinage offences*); c. 100, s. 77 (*offences against the person except common assault*); the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24, s. 3); the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69, s. 18); the Official Secrets Act, 1889 (52 & 53 Vict. c. 52, s. 11); the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69, s. 5); the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41, s. 20); the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 700); and the Larceny Act, 1896 (59 & 60 Vict. c. 52, s. 1 (4)); and petty misdemeanours, triable on indictment, at the election of the accused (42 & 43 Vict. c. 49, s. 17).

The offences italicised are now either abolished or are dealt with by the Consolidation Acts of 1861 or the Criminal Law Amendment Act, 1885.

The allowance or disallowance of the costs is in all cases in the discretion of the Court of trial, except in a prosecution by the Treasury Solicitor for an offence against the coin (24 & 25 Vict. c. 99, s. 42); and where an order of a competent Court has been made for a prosecution for perjury (14 & 15 Vict. c. 100, s. 19), or for any offence under the Debtors Act, 1869, or any amending Act (including the Bankruptcy Acts of 1883 and 1890), the costs are payable out of the local rate, unless the Court specially orders otherwise (32 & 33 Vict. c. 62, s. 17).

The costs are limited to a reasonable indemnity to the prosecutor and witnesses for their expense, trouble, and loss of time in attending the pre-

• **liminary inquiry and the grand jury and at the trial, if any.** The order for payment is made on the application of the prosecutor or the witness, and the amount ascertained by the proper officer of the Court in accordance with the scale prescribed by the Secretary of State under 14 & 15 Vict. c. 55, ss. 5, 6. The regulations on this subject are collected in *St. R. & O., Rev., vol. ii. p. 589*; *St. R. & O., 1895, p. 105*; and *St. R. & O., 1896, p. 85*. It is now made upon the treasurer of the administrative county or borough on the local rate whereof the costs are to fall, who must attend personally or by deputy at the Court to pay the orders at sight (7 Geo. IV. c. 64, ss. 24, 25, 29; 4 & 5 Will. IV. c. 36, s. 12; 51 & 52 Vict. c. 41, s. 67).

The costs of prosecuting offences in the Admiralty jurisdiction are paid in the first instance out of the local rate of the county or borough where the trial takes place, but are repaid out of moneys provided by Parliament (57 & 58 Vict. c. 60, s. 701). Under the Criminal Law Amendment Act, 1867, the provisions of 7 Geo. IV. c. 64, as to payment of witnesses for the prosecution, were extended to all witnesses for the defence in any charge of felony or misdemeanour (except witnesses to character), who are called at the preliminary inquiry and bound over to attend the trial (30 & 31 Vict. c. 35, s. 5).

The costs of a preliminary inquiry into an indictable offence are thus regulated—

(a) Where the accused is committed for trial for any of the offences above specified, the committing justices can grant a certificate of the costs of the preliminary inquiry (including the costs of witnesses called by the defendant before the justices), upon production whereof the Court of trial can order their payment as part of the costs of prosecution (7 Geo. IV. c. 64, s. 22; 14 & 15 Vict. c. 55, s. 5; 30 & 31 Vict. c. 35, s. 5).

(b) Where at the end of a preliminary inquiry the justices refuse to commit for any offence marked * in the above list, they can still certify for the costs of the preliminary inquiry if the charge was made in good faith, and in the case of a felony also upon reasonable and probable grounds.

Such certificate is sent to Quarter Sessions, and the Court may order payment of the amount certified if it is certified by the clerk of the peace as correct (29 & 30 Vict. c. 52, continued by 59 & 60 Vict. c. 39). This power is in strictness limited to the offences marked with a star in the above list.

(c) Where an indictable offence is tried summarily, the Court of summary jurisdiction can certify the costs of the trial to the same extent as if it had been a preliminary inquiry, and the certificate has the same effect as an order of the Court of trial (42 & 43 Vict. c. 49, ss. 27, 28).

The local rate out of which these costs are payable is now, in the case of an administrative county or a borough which is not a county borough, the county rate; in a county borough, the borough rate; or in places, if any, not subject to either rate, the poor rate (7 Geo. IV. c. 64, ss. 24, 25; 42 & 43 Vict. c. 49, s. 49; 51 & 52 Vict. c. 41, ss. 35–39).

There is a concurrent, but it is believed superseded, provision in sec. 169 of the Municipal Corporations Act, 1882, as to costs in boroughs. Where cases arising in the county of a city or town are tried in an adjoining county (under 38 Geo. III. c. 52; 51 Geo. III. c. 100), the costs of the prosecution fall on the city or town if it be a county borough. See **CERTIORARI**. Provision is made for reimbursing the local rate out of the **LOCAL TAXATION GRANTS (q.v.)**.

Guardians of the poor are also allowed to charge to the poor rate or common fund the expense of certain prosecutions undertaken by them

with respect to children (24 & 25 Vict. c. 100, s. 73; 57 & 58 Vict. c. 41, s. 21).

The costs of conveying a defendant to prison are payable by him if he has means (3 Jac. I. c. 10); if not, they were paid out of the county or borough rate, or in Middlesex out of the poor rate (27 Geo. II. c. 3, s. 1; 11 & 12 Vict. c. 42, s. 26); but they are now defrayed as part of the maintenance of prisoners in a prison under the Prison Act, 1877.

Costs payable by Defendant.—Under the Forfeitures Act, 1870 (33 & 34 Vict. c. 23, s. 3), power was given to order payment by a person convicted of treason or felony of the whole or part of the costs of his prosecution. The payment is enforced either out of any money found on the accused when arrested, or in the same way as judgment in a civil action. In the case of felony, until the costs are paid by or recovered from the felon, they are provided for out of the local rate, with a provision as to reimbursement. Similar provision is made (48 & 49 Vict. c. 69, s. 18) as to indecent assault and misdemeanour indictable under the Criminal Law Amendment Act, 1885, and as to assaults generally (24 & 25 Vict. c. 100, ss. 74, 75), in the latter case enforceable by imprisonment on failure to pay the costs.

On an indictment for nuisance by non-repair of a highway, the defendant may be ordered to pay the costs of the prosecution if the defence is frivolous and vexatious (5 & 6 Will. IV. c. 50, s. 98). There is also power to make a defendant pay costs on indictment for causing a nuisance by improper construction or negligent user of certain kinds of furnaces (1 & 2 Geo. IV. c. 41, ss. 1–3).

Costs payable by Prosecutor.—The Court can order a private prosecutor to pay the defendant's costs in the following cases:—

(1) When a magistrate has refused to commit for trial for an offence within the Vexatious Indictments Act, 1859, and the prosecutor is bound over under that Act, and the defendant is ultimately acquitted (22 & 23 Vict. c. 19; 30 & 31 Vict. c. 35, s. 2);

(2) On an unsuccessful prosecution for a corrupt practice at a parliamentary or municipal election (17 & 18 Vict. c. 102, s. 12). The costs in each case are taxed by the proper officer of the Court of trial, and enforced in the same way as a judgment of the High Court.

Costs of an Indictment for Libel.—In the case of an indictment by a private prosecutor for the publication of a defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover his costs from the prosecutor (6 & 7 Vict. c. 96, s. 8). Such costs must first be taxed by the proper officer of the Court before which the said indictment is tried; and this should be done before the next commission of assize issues, if the case was tried at the assizes, else the clerk of assize will be *functus officio*; his taxation cannot be reviewed by the Queen's Bench Division (*R. v. Newhouse*, 1853, 22 L. J. Q. B. 127). No special order to tax is necessary (*R. v. Sully*, 1848, 12 J. P. 536). But unless the indictment has been removed into the Queen's Bench Division, there is no way of issuing execution for such costs; they must be recovered therefore by an ordinary action at law (*Richardson v. Willis*, 1873, L. R. 8 Ex. 69). If the grand jury throw out the bill, the Court has, unfortunately, no power to give the defendant his costs; this is a *casus omissus* in drafting sec. 8 of Lord Campbell's Act (*R. v. Murry*, 1893, 57 J. P. 136). *

So, if a defendant pleads a justification and the issue be found for the prosecutor, the prosecutor may recover from the defendant the costs which he has sustained by reason of such plea, whatever be the result of any other issue (6 & 7 Vict. c. 96, s. 8). But this section does not apply to Crown

prosecutions, or to any proceedings for blasphemous, obscene, or seditious libels. And there is no provision enabling a prosecutor to recover the general costs of the prosecution. If, however, a fine be imposed on the defendant as part of his sentence, the prosecutor may sometimes, by memorialising the Treasury, obtain a portion of the fine towards the payment of his costs.

3. *Costs of a Criminal Information.*—Every criminal information is a proceeding in the Queen's Bench Division. But the Rules of the Supreme Court do not apply to criminal proceedings on the Crown side of that Division (Order 68, r. 1); nor does the Judicature Act of 1890 (see sec. 4). Hence the former practice remains unchanged, subject only to the Crown Office Rules of 1886. The trial must take place within one year after issue joined; and if not, or if the prosecutor enters a *nolle prosequi*, the Court, on motion for the same, may award the defendant his costs to the amount of the recognisance entered into by the prosecutor on filing the information. So, too, the Court may on motion award the defendant his costs to the same amount, if he be acquitted, unless the judge at the trial certifies that there was reasonable cause for the information (Crown Office Rules, 1886, r. 49). But this rule does not apply to an information by a private prosecutor for the publication of any defamatory libel. If judgment be given for the defendant on such an information, he will be entitled to recover from the prosecutor the whole of the costs which he has sustained by reason of such information (*ibid.* r. 50). And the judge at the trial cannot in this case deprive the successful defendant of his costs, by certifying that there was reasonable cause for the information (*R. v. Latimer*, 1850, 15 Q. B. 1077; 20 L. J. Q. B. 129). The Master of the Crown Office taxes the costs under a side-bar rule; and he may allow costs incurred by the defendant previously to the filing of the information (*R. v. Steel and Others*, 1876, 2 Q. B. 1. 37). On such taxation, execution issues in the ordinary way (*R. v. Latimer, supra*). There is no power, however, to condemn the defendant to pay the costs of the prosecution, if he be convicted or plead guilty, unless indeed he files a special plea of justification under Lord Campbell's Act, in which case he will have to pay the costs incurred by reason of that plea (6 & 7 Vict. c. 96, s. 8; Crown Office Rules, 1886, r. 50; and see *ante*, p. 516).

[*Authorities.*—See *Russ. on Crimes*, 1896; Archbold, *Criminal Law*, 1894; Stone, *Justices' Manual*, 1895; Odgers on *Libel*, 3rd ed.]

Cottage.—A cottage has been defined as “a little house without land to it” (Co. Litt. 56 b). “By the grant of a cottage doth pass a little dwelling-house that hath no land belonging to it” (Shep. Touch. 94). In *Doe d. Hubbard v. Hubbard*, 1850, 20 L. J. Q. B. 61, a testator devised to his son D. H. “all these two cottages, the one occupied by my son John Hubbard, and the other occupied by my granddaughter.” The premises occupied by John Hubbard and the granddaughter were rooms partitioned off, and had separate entrances from, larger cottages; and it was held that these rooms fulfilled the terms of the devise, and consequently that these only, and not the whole of the cottages of which they had been part, passed to the devisee.

The word “cottage” in Part III. of the Housing of the Working Classes Act, 1890, may include a garden of not more than half an acre, provided that the estimated annual value of such garden does not exceed £3 (s. 53). “Cottage” is also used in the Allotment Acts, but no definition of the word is given.

By 31 Eliz. c. 7, the erection of cottages outside towns, except in certain specified cases, was entirely prohibited, unless at least four acres of land, the freehold of the owner of the cottage, adjoined and were continually occupied with the cottage. This statute remained in force till 1775, when it was repealed by 15 Geo. III. c. 32.

Cotton Cloth Factories.—Processes incident to the manufacture of cotton can only be carried on subject to the restrictions prescribed by the Factory Acts for observance in textile factories (see FACTORY). But a special Act was passed in 1889 (52 & 53 Vict. c. 62), applying to cotton cloth factories, which expression is defined to mean "any room, factory, shed, or workshop, or any part thereof, in which the weaving of cotton cloth is carried on." By the Factory Act, 1895, 58 & 59 Vict. c. 37, s. 31, the Cotton Cloth Factories Act, 1889, was applied to every textile factory in which atmospheric humidity is artificially produced by steaming or other mechanical appliances, unless such factory is already subjected by the Home Secretary to special rules as being dangerous or injurious to health.

The Act, therefore, now applies to all textile factories in which there is or may probably be an excess of moisture, deleterious to the constitutions of the workpeople employed in it. It is directed to preventing any such excess of humidity. A schedule is enacted prescribing the amount of moisture per cubic foot of air permissible. This varies according to the temperature existing in the factory (s. 5). The schedule may from time to time be repealed or altered by the Home Secretary, subject to the approval of Parliament (s. 6). The moisture and temperature are to be ascertained by observing standardised wet and dry bulb thermometers, which are to be kept in the factory, and the readings recorded twice in every working day (s. 7). Where humidity is artificially produced, notice thereof must be given in writing to the chief inspector of factories (s. 8), and the factory must then be visited at least once in every three months by a factory inspector, who must specially examine into and report upon the temperature, humidity, ventilation, and quantity of fresh air in the factory (s. 10). In all such factories arrangements must be made and maintained, to the satisfaction of the factory inspector for the district, for admitting at least 600 cubic feet of fresh air per hour for each person employed therein (s. 9).

In case of a contravention of, or non-compliance with, any of the provisions of the Act, the inspector is to give the occupier of the factory notice in writing of the acts or omissions constituting the contravention or non-compliance. If such acts or omissions are continued or not remedied, or are repeated within twelve months after such notice has been given, the occupier becomes liable to substantial penalties, the minimum being £5 (s. 13).

If the production of humidity by artificial means in a factory ceases, the occupier may give notice in writing of such cessation; and from the date of such notice, and so long as humidity is not artificially produced in a factory, the special provisions of the Act do not apply (s. 11). It would then be subject to the ordinary provisions applicable to all textile factories.

Cotton Marks.—The registration of trade marks for cotton goods was formerly subject to special rules, which are now repealed (see, as

to the *A. Orr-Ewing v. The Registrar of Trade Marks*, 1877, 4 App. Cas. 479; Sebastian on *Trade Marks*, 3rd ed., p. 548). The only special rule now affecting it is the rule (r. 13) requiring four, instead of two, representations of the mark to accompany an application to register. A special branch office of the Trade Marks Register is maintained in Manchester (address, "The Comptroller, Manchester Trade Marks Branch, 48 Royal Exchange, Manchester"), principally for the registration of cotton marks, and the Chancery Court of the County Palatine has co-ordinate jurisdiction with respect to marks, the registration whereof is applied for in Manchester (Patents, etc., Act, 1888, s. 26).

Council, General Medical.—See MEDICAL PRACTITIONER.

Counsel or Procure.—A person who counsels or procures the commission of an offence, (1) if it be treason or misdemeanour, is a principal offender; (2) if it be felony, is an accessory before the fact. See ABETTOR; ACCESSORY.

Count in Declaration.—Formerly the pleading in which the plaintiff in personal actions stated his cause of action against the defendant was called the "declaration" (see DECLARATION), and each separate cause of action in the declaration was termed a "count," from the French word *conte*, a narrative.

In the case of simple contracts resulting in mere debts, certain concise forms of counts were generally used, which were described as *common counts* or *common indebitatus counts*. These counts stated the cause of action by a general description, and were supplemented by particulars of demand (Bullen and Leake, *Precedents of Pleading*, 3rd ed., p. 35). Counts which stated the cause of action more fully were called *special counts* (*ibid.*).

At one time counts in actions on contracts could not be joined in the same declaration with counts in actions for torts, and, with certain exceptions, counts in one species of action could not be joined with counts in another (1 Chitty on *Pleading*, 7th ed., p. 223), but these restrictions were removed by the Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76, s. 41), and the joinder of causes of action is now regulated by the Rules under the Judicature Acts (see R. S. C., Order 18). Under these Rules the modern statement of claim is substituted for the old form of declaration; and though counts are thus practically abolished, they are, to some extent, replaced by the rule which provides that where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly (R. S. C., Order 20, r. 7).

Count in Indictment.—In preparing an indictment, it is necessary to state each charge made in a separate clause, called a count (*conte*). A count which contains allegations as to the commission of more than one offence is bad for duplicity, if the objection is taken before verdict (Archb. *Cr. Pl.*, 21st ed., 74). Where it is uncertain whether the facts to be proved will in law constitute one offence or another, it is usual to

insert sufficient counts to specify in terms of Act all the alternative offences of which it is possible the evidence may justify conviction, where such offences can be lawfully joined in the same indictment (see JOINDER).

In form a count in an indictment differs from a count in a declaration under the common law system of pleading, mainly by its commencement: "The jurors for our lady the Queen" (*i.e.* the grand jurors) "on their oath present that," and in the formal conclusion: "Against the form of the statute or statutes in that case made and provided, and against the peace of our sovereign lady the Queen, her crown and dignity." In second or subsequent counts the form begins: and the "jurors aforesaid, on their oath aforesaid, do for the present," etc. It also, consequently, differs from civil proceedings in that strictly counts cannot be struck out, being the presentment of a grand jury and not under the direct control of the parties, nor amended, except under special statutory provision. See further, PLEADING in *Criminal Cases*.

Counter-Claim.—See DEFENCE AND COUNTER-CLAIM; SET-OFF.

Counter-Deed.—A secret deed which annuls or alters a public writing or act.

Counterfeit, Counterfeiting (*Contre fait, Contra facere*).—See COIN; FORGERY.

Counterfeit Mark.—Sec. 2 of the Gold and Silver Wares Act, 1844, makes it felony to mark with any forged or counterfeit die any gold or silver ware. [See also COIN; MERCHANDISE MARKS; TRADE MARKS.]

Countermark.—An additional mark put on goods already marked, for greater security.

Counter-Notice.—By sec. 92 of the Lands Clauses Act, 1845, no party is obliged to sell or convey to the promoters of an undertaking a part only of his house, building, or manufactory, if he is willing and able to sell the whole thereof. If desirous of availing himself of this provision, the party must give what is called a counter-notice to the promoters, calling upon them to take the whole of such house, etc. This should specify the premises, but need not be in any particular form; a verbal notice has been held sufficient (*Binney v. Hammersmith and City Ry. Co.*, 1863, 8 L. T. 161). It need not be, but usually is, served within twenty-one days after service of the notice to treat (see NOTICE TO TREAT). Its effect is to suspend the notice to treat until the counter-notice is accepted by the promoters; when so accepted, the relation of vendor and purchaser is created as to the whole house or other building (*Selwinge v. London and Blackwall Ry. Co.*, 1855, 24 L. J. Ch. 405); but the promoters may, on receiving it, abandon their notice to treat altogether (*King v. Wycombe Ry. Co.*, 1860, 28 Beav. 104). See Cripps, *Law of Compensation*, 3rd ed., pp. 42 *et seq.*

• **Counterpart.**—A counterpart of a deed is the duplicate or *facsimile* executed by a person other than the grantor (2 Black. Com. 296). Of the two instruments each is alternately primary evidence as against the party executing it and those in privity with him, and secondary evidence of the contents of the other part (Taylor, *Ex. s.* 426). Thus in an action to recover possession of premises upon a forfeiture, the landlord may, in order to prove his right of re-entry, put in evidence the counterpart in his own possession, even without giving his opponent notice to produce the lease (*Roe v. Davis*, 1806, 7 East, 363). So, in default of production of a counterpart of conveyance executed by the purchaser of lands, after due search made for such counterpart by the representatives of the vendor, secondary evidence of the conveyance by the purchaser is admissible (*Witham v. Vane*, 1883, 32 W. R. 617 (H. L.), more fully reported in *Challis on Real Property*, App. at pp. 401 *et seq.*). In the event of conflict between a deed and its counterpart, the general rule is that the former will prevail over the latter (Shep. Touch. 53). But this only applies where the difference is between the deed, consistent in itself, and the counterpart, and not where the discrepancy between the two arises from the deed having inconsistent clauses (*Burchell v. Clark*, 1876, 2 C. P. D. 88). Nor does it apply as between instruments of demise and their duplicates which are not under seal (*Ingleby v. Slack*, 1890, 6 T. L. R. 284).

The counterpart of any instrument chargeable with any duty requires the same stamp as the original instrument where such duty does not amount to five shillings, and five shillings in any other case. With the exception of the counterpart of an instrument chargeable as a lease, such counterpart not being executed by, or on behalf of, any lessor or grantor, the counterpart of an instrument chargeable with duty is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid on the original instrument (Stamp Act, 1891, s. 72, and 1st Sched.). A lessee who executes a counterpart cannot impeach its validity on the ground of the original lease not having been properly stamped (*Paul v. Meek*, 1828, 2 Y. & J. 116); hence a lessor suing his lessee and producing an instrument bearing a counterpart stamp may prove its execution by the lessee without proving execution of the lease by himself (*Hughes v. Clark*, 1851, 10 C. B. 905; *Houghton v. Koenig*, 1856, 18 C. B. 235).

• The counterpart of a lease being for the security of the landlord, the ordinary rule throwing liability upon the lessee for the expense of preparing a lease does not extend to the counterpart, nor does it make any difference that the agreement between the parties expressly stipulates for the cost of the lease being borne by the lessee (*Jennings v. Major*, 1837, 8 Car. & P. 61). Consequently the latter is entitled to deduct the cost of the counterpart from the amount which, according to the scales relating to leases under the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, the landlord's solicitor is entitled to charge "for preparing, settling, and completing lease and counterpart" (*In re Negus*, [1895] 1 Ch. 78).

• Attestation cannot be claimed by the lessor of the counterpart of a lease executed by the lessee (*Borradaile v. Smart*, 1857, 5 W. R. 270).

The object of a counterpart being to place all the parties to an instrument in possession of the best evidence relating to it, the absence of a counterpart has often given rise to difficulties, to overcome which an equitable principle has been brought in and worked out by the Courts of common law. It has been laid down that in such a case a trust may be implied on

the part of the person who holds the original document, to the effect that he should produce it for the inspection of another having a common interest in the document, as forming the basis of an action (*Brown v. Liell*, 1885, 16 Q. B. D. 229). This applies where a deed is executed without counterpart (*Blakey v. Porter*, 1808, 1 Taun. 386), or where the counterpart is not to be found (*Doe v. Slight*, 1832, 1 Dowl. 163), or where a memorandum has been subsequently indorsed on the deed, but not on the counterpart (*Mayor of Arundel v. Holmes*, 1839, 8 Dowl. P. C. 118).

Counter Roll (*Contra rotulus*).—A counter roll was a roll kept by one official as a check or control on the acts and intromissions of another, e.g., in the receipt department of the Exchequer by a sheriff of things belonging to the office of a coroner. In this sense it is correlative to controller (*contrarotulator*). The sheriff's duty to keep these counter rolls was created by 3 Edw. I. c. 10, 1275, and the sheriff seems to have been bound to lay before the justices in eyre either these counter rolls or transcripts of the material portions of the coroner's records as to offences and estreats (see 9 Seld. Soc. Publ. pp. xi-xiv).

Countersign.—A signature placed alongside, or in addition to, another signature for the purpose of authentication or confirmation. In the case of most orders issuing from the Crown, countersignature by a minister is necessary; for example, under the Great Seal Act, 1884, it is provided that warrants under Her Majesty's sign manual, "countersigned by the Lord Chancellor, or by one of Her Majesty's principal Secretaries of State, or by the Lord High Treasurer, or two of the Commissioners of Her Majesty's Treasury, shall be a necessary and sufficient authority for passing any instrument under the Great Seal of the United Kingdom" (s. 2).

The result of affixing such countersignature is to make the minister doing so responsible for the particular act of the Crown. (See Dicey, *Law of the Constitution*, 5th ed., ch. xi.; Anson, *Law and Custom of the Constitution*, Part II., 2nd ed., pp. 49 *et seq.*)

The countersignature of some person is rendered essential by statute in certain cases to the validity of various orders. For example, under the Municipal Corporations Act, 1882, s. 141, orders for payments of money out of borough funds have to be signed by three members of the council, and countersigned by the town clerk; similarly under the Local Government Act, 1888, s. 80, orders for payments out of the county fund have to be signed by three members of the finance committee, and attested by the countersignature of the clerk of the council.

Counting House of the Queen's Household.—Another name for the Board of Green Cloth (*q.v.*) (over which the Lord Steward presides), where the accounts of the royal household are dealt with (Coke, *Institutes*, iv. ch. xix.; and article on "Royal Household" in *Encycl. Brit.* vol. xxi.).

Country Agent; Country Solicitor. — See AGENCY TERMS; SOLICITOR.

Country, Custom of.—See CUSTOM.

County.—*History.*—A shire was in Anglo-Saxon days any portion of England which was cut off from the rest for separate administration. At the head of each shire was an ealderman or earl, who was originally appointed by the Witenagemote; and when the earl came to be too great a personage to attend to the details of local government, and especially to fiscal matters, a sheriff (*shire-reeve*=county steward) was appointed by the king to preside over the *shire-moot* (county meeting), to proclaim the king's dues, and to dispose of all petty lawsuits, civil and criminal (see SHERIFF). The bishop also had some share in the administrative business of the county. After the Norman Conquest the earl became a count (*comes*, the companion and friend of the king); the shire became a county (*comitatus*); and the shire-moot, or County Court (which under Edgar met only twice a year), became a monthly gathering. Henry I. sent his judges to the County Courts to hear and decide revenue cases. Henry II. instructed his justices on circuit to try all important cases, civil or criminal, in the shire Courts, thus at once preventing the feudal lords from setting up private Courts of justice of their own, as in France, and also curbing the power of the sheriffs. By the Assize of Clarendon (1166) all landholders were obliged to attend the County Court twice a year to meet the king's justices. This was the origin of the county assizes.

Area.—The counties seem at first to have varied in number and size; and their boundaries were indefinite and fluctuating, especially on the Welsh marches. But by the reign of Henry VIII., England and Wales were definitely mapped out into fifty-two counties. But Yorkshire has three ridings, Lincolnshire has three parts (the parts of Holland, of Kesteven, and of Lindsey), and Suffolk and Sussex have each an eastern and a western division; and each of these ridings, parts, and divisions is for purposes of local government a separate county. To these must be added the Isle of Ely, the Soke of Peterborough, and the newly-created county of London, bringing the number up to sixty-one. There are also sixty-one county boroughs, so that we arrive at a total of a hundred and twenty-two administrative counties now in England. Every county is for judicial purposes subdivided into petty sessional divisions. The justices in Quarter Sessions (*q.v.*) have power under 9 Geo. IV. c. 43, to rearrange and adjust the boundaries of these divisions.

Officers.—The most ancient of the still existing officers of a county are the sheriff and the coroner. By the Statute 14 Edw. III. c. 7, the office of sheriff was made annual. It is an unpaid office; but the person chosen is liable to a heavy fine if he refuses to serve. The office of coroner is said to date back to the reign of King Alfred; and in spite of his name he was always, apparently, elected by the freeholders of the county (see CORONER). Lords-lieutenant were first appointed by Henry VIII. Their duties originally were more military than civil. The militia, under the lord-lieutenant, took the place of the *posse comitatus* headed by the sheriff. But the lord-lieutenant is generally also *custos rotulorum* (*q.v.*), or keeper of the records of the county, and as such he is the principal justice of the peace for the county, and appoints the clerk of the peace. He also recommends to the Crown persons whom he deems qualified to be justices of the peace.

Justices of the peace were first appointed by the Statute 34 Edw. III. c. 1. They are appointed by the Crown on the recommendation of the lord-

lieutenant; and there is no limit to the number which may be appointed in any county. They hold office for life, but may be removed for misconduct by the Lord Chancellor. The qualification is the enjoyment of an estate in possession of £100 a year, or the reversion in an estate of not less than £300 a year, or two years' assessment to the Inhabited House Duty at not less than £100 a year. Their judicial functions, though defined and limited by statute, depend ultimately on the terms of their commission. The commission now is substantially the same in form as the commission which was settled by the judges in the time of Queen Elizabeth. A justice is appointed for the whole county; but, except in Quarter Sessions, he in practice acts only in the petty sessional division in which he resides. Any two or more justices acting in their own division constitute a petty sessions (*q.v.*). When a petty sessions is summoned by special notice given to all the members of the petty sessional division, it is called a special sessions (*q.v.*). Until 1888, the local government of each county was entirely in the hands of the justices, and, as a rule, its affairs were admirably managed.

The other officers of the county are the clerk of the peace (*q.v.*), the county treasurer, the county analyst, the county surveyor, and the chief of the police.

County Borough.—Sixty-one large boroughs, which were already counties of themselves, or had populations of not less than fifty thousand, were constituted county boroughs by sec. 31 of the Local Government Act, 1888. A list of them will be found in Schedule 3 to the Act. A county borough is an administrative county. It is practically exempt from the jurisdiction of the county council of the county in which it is situate, hence its inhabitants have no vote for the county council of that county. The borough council of a county borough has most of the powers of a county council, and special regulations have been made for the adjustment of its financial relations with the county at large. (See **BOROUGH**.)

County Bridge is a bridge reparable, formerly by the inhabitants, now by the council, of a county, as distinguished from bridges reparable by a hundred, parish, or private corporation or person. Such bridges are always situate in highways. No modern bridge can become a county bridge unless the conditions imposed by 43 Geo. III. c. 59, s. 5, and 41 & 42 Vict. c. 78, s. 21, are satisfied, or unless it is taken over under ss. 6, 11 of the Local Government Act, 1888. See **HIGHWAYS**.

County Buildings.—All county buildings were transferred to county councils by secs. 3 and 64 of the Local Government Act, 1888, subject as to their use by Quarter Sessions and justices to the provisions of the Act respecting the standing joint committee of Quarter Sessions and the county council; and county councils are given full power to manage, alter, and enlarge such buildings, and, with consent of the Local Government Board, to alienate them; but proper accommodation is to be provided for Quarter Sessions and justices out of sessions.

County councils are rateable in respect of buildings occupied by them for administrative purposes, although such buildings may also be occupied by justices for Crown purposes (*Worcester County Council v. Worcester Union*,

[1897] 1 Q. B. 480, and *Middlesex County Council v. St. George's, Hanover Square*, [1897] 1 Q. B. 64).

County Corporate.—A city or town to which, out of special favour, the Crown has granted to be a county of itself, and not to be comprised in any other county, but to be governed by its own sheriff and other officers (1 Black. Com. 119). Counties corporate are sometimes called counties of cities or counties of towns; several of them have retained their ancient privileges in full, but others by modern statutes have been included for various purposes in counties at large.

The appointment of sheriffs in counties corporate is regulated by sec. 170 of the Municipal Corporations Act, 1882, and sec. 36 of the Sheriffs Act, 1887.

By the Local Government Act, 1888, each of certain specified boroughs, not previously counties corporate, is made for the purposes of that statute an administrative county of itself, and is called in the Act a county borough. See COUNTY; COUNTY BOROUGH.

County Council.—*Powers and Duties.*—By the Local Government Act, 1888 (51 & 52 Vict. c. 41), a new elective body was created in each of the sixty-one counties mentioned (*ante*, p. 523); and to this new body were transferred all the powers and duties formerly possessed and discharged by justices in Quarter Sessions relating to matters of local government. But no judicial functions were transferred (s. 78, subs. (2)). A county council is not a Court; its duties are purely administrative (*Royal Aquarium v. Parkinson*, [1892] 1 Q. B. 431; *Ex parte Edwards*, 1895, 71 L. T. 638). The control of the county police is vested in a joint committee of the county council and the county justices. But in all other local concerns the county council now practically governs the county (see s. 3). It repairs all main roads and county bridges (see *The County Council of Derby v. Matlock Bath*, [1896] App. Cas. 315); it provides and maintains shire-halls, pauper lunatic asylums, reformatories, and industrial schools; it prevents the pollution of rivers; it carries into execution the laws for the repression of contagious diseases in animals and of destructive insects; it protects wild birds, and conserves fish; it assists or organises technical education; it registers dissenting chapels, and the rules of various societies; it appoints the county coroner; it directs the registration of voters and provides polling stations, etc., for any parliamentary election; it pays the salary of the clerk to the justices, and the cost of the Assizes and Quarter Sessions; it pays half the cost of the clothing and pay of the county police; it grants licences for music and dancing, and for racecourses; it insists on the use of proper weights and measures; it protects the purchaser of coal; it makes and levies the county and other rates. And as though these very various functions were not enough for one body to discharge, the Local Government Act of 1894 enlarges its powers. The county council is charged by that Act with a kind of general supervision over parish and district councils. It settles their areas and boundaries. If they quarrel, the county council is to arbitrate between them; if they neglect their work, the county council is to do it for them. In fact, it is made the duty of the county council to see that the new system of local government works properly all over the county.

Members.—Every county council is a body corporate (Local Government Act, 1888, s. 79 (1)); the number of its members varies according to the

size of the county—from 28 for Rutland and 32 for Radnor, to 120 for the West Riding and 137 for London. One-fourth of this number are county aldermen. The ordinary councillors are elected by the county electors for a period of three years. At their first meeting in each such period they elect half the number of aldermen; the aldermen hold office for six years, and retire by halves. The aldermen are often chosen from the existing councillors; but this is not necessary; anyone qualified to be a councillor may be elected an alderman. If a councillor be elected alderman, he vacates his seat as an ordinary councillor.

Qualification.—To be eligible as a county councillor, a man must be—

- (i.) A parliamentary voter, registered as such in respect of ownership in the county; or
- (ii.) A peer owning property in the county; or
- (iii.) Qualified to be registered as a municipal elector in any borough which is not a county borough; or
- (iv.) Qualified in all respects save that of residence to be a municipal elector in any borough not a county borough, but resident within fifteen miles of that borough, and liable to be rated in respect of property therein above a certain limit of value.

But no woman can be elected a county councillor (*De Souza v. Cobden*, [1891] 1 Q. B. 687); no person holding any paid office in the gift of the council; no person who has any interest, direct or indirect, in any contract with the council; and no uncertificated bankrupt for five years after his discharge. But a clerk in holy orders or a dissenting minister may be a councillor, and therefore an alderman.

Electors.—A roll is kept in each county of the persons qualified to vote at an election for the county council. A county elector may be a man or a woman, but must be either enrolled as a burgess of some borough which is not a county borough, or registered as a county elector under the Act of 1888 (51 & 52 Vict. c. 10). And, speaking generally, every person (male or female) who has during the twelve months preceding the 15th July in any year occupied any building (or any land of the clear yearly value of £10), rated to the relief of the poor, has resided in the borough or parish, or within seven miles of it, during such twelve months (or in the case of the £10 occupier, for six months), and has paid all rates which have been assessed in respect of such property up to the 20th July immediately following, is qualified to be so enrolled or registered, unless he or she is under age, or is insane, or an alien, or has been within the preceding twelve months in receipt of poor relief, or is disqualified by any specific Act of Parliament, *e.g.* for bribery. And see the Statutes 54 Vict. c. 11, and 54 & 55 Vict. c. 68. The burgesses of a county borough are exempt from the jurisdiction, and take no part in the election, of any county council. And note that no county elector, though registered in more than one electoral division of the same county, may vote in more than one division at the same county council election (*Knill v. Towse*, 1890, 24 Q. B. D. 186, 697).

Officers.—The officers of a county council are its chairman, vice-chairman, clerk, and treasurer. The chairman is elected annually by the whole council. He is *ex officio* a justice of the peace for the county (s. 2 (5) b). He need not be a member of the council; it is enough if he is qualified to be a councillor; if he be a member, his appointment as chairman does not vacate his seat. He is generally paid a salary which is insufficient to defray the expenses attached to the office. Outside London, the clerk of the peace for the county is always clerk to the county council; but the treasurer is appointed by the council itself.

* *Finances.*—The financial year of a county council is from 1st April in one year to 31st March in the next (s. 73). At the commencement of each financial year an estimate of its probable receipts and expenditure during that year is prepared and laid before the council (s. 74). At the close of each financial year its accounts are made up, and a résumé of them published. Any ratepayer may inspect the original accounts, which are subsequently audited by a district auditor appointed by the Local Government Board (s. 71). And see COUNTY RATE. A finance committee is regularly appointed to attend to the financial business of the council, three of whom at least must sign every order for any payment to be made by the county treasurer.

[*Authorities.*—See ordinary text-books on LOCAL GOVERNMENT, a complete list of which is appended to that article.]

County Courts.

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INTRODUCTION.

The County Court was instituted by King Alfred when he divided the kingdom into shires or counties. "This Court, or rather the Sheriffs' Turn, held in every wapentake (as it is recorded by Mr. Selden in his *Treatise on Tithes*), was jointly exercised by the bishop of the diocese, and by the sheriff or alderman of the Scyresgemot or Hundred or County Court, where the one sat to give God his right, the other for public right" (Greenwood on *The Authority, etc., of County Courts*, 9th ed., p. 2). Soon after the Norman Conquest the holding of ecclesiastical pleas in the Hundred or County Court was taken away (*ibid.*).

The Court was held once every lunar month upon a certain day, the Statute 2 Edw. VI. c. 25, which seems merely to have declared the ancient

usage of the Court, enacted that no Court should be adjourned for longer than one month of twenty-eight days.

The freeholders of the county were the real judges, and the sheriff was their ministerial officer to pronounce the judgment of the Court.

The jurisdiction of the Court was limited—it held no plea of debt or damage to the value of 40s. or above, nor of trespass *vi et armis*, because a fine was thereby due to the king (*ibid.*).

The County Court might, however, hold plea of many real, and all personal actions, to any amount, by virtue of a special writ called a “justicies”; which was a writ empowering the sheriff, for the sake of despatch, to do the same justice in his County Court as might otherwise be had at Westminster (Blackstone (Couch), vol. iii. p. 36).

The County Court was then not a Court of record.

The great conflux of freeholders, who were supposed always to attend the County Court, was the reason why all Acts of Parliament were wont, at the end of every session, to be there published by the sheriff, and why all popular elections had to be made in full County Court (*ibid.*).

After justices of assize were, in the reign of Henry II., appointed to visit the different counties, the Court was not so much resorted to.

The proceedings in the County Court having become expensive and dilatory, Courts of request, in which parties were examined and judgment awarded in a summary manner, were established.

In 1845 (8 & 9 Vict. c. 127) the jurisdiction of certain Courts of request and other local Courts was extended and provisions made for increasing their efficiency. Difficulties, however, arose in carrying out this enactment, and so in 1846 the 9 & 10 Vict. c. 95, was passed, and by Order in Council, dated the 9th March 1847, the present County Courts were established.

From 1846 to 1887 numerous statutes enlarged the jurisdiction of the Court, but in 1888 the whole of these statutes were repealed by the County Courts Act, 1888 (51 & 52 Vict. c. 43), by which the constitution, jurisdiction, and practice of the Court is now regulated.

Once the County Court is seized of a case within its jurisdiction, the law by which that case is decided and the rules of evidence are the same in the County Court as in the superior Courts; it is proposed, therefore, in this article to treat of County Courts, their districts, officers, jurisdiction, and practice under the County Courts Act, 1888, as extended by the Judicature Acts. Next to deal in alphabetical order with the numerous statutes giving to the Courts special and extended jurisdiction, calling attention, when treating with any particular statute, to any special matter relating to the practice in, or to the appeal from, the Court.

The first rules and forms under the Act were published in 1889. Since then many alterations have been, and from time to time are, made in the rules and forms; the rules and forms for the time being in force will be found in the *Annual County Court Practice*.

Courts and Districts.—County Courts are Courts of record (s. 5); for every Court there is a seal, and all summonses and other process must be under the seal of the Court, and when purporting to be so sealed shall in England be received in evidence without further proof thereof (s. 180).

By the 9 & 10 Vict. c. 95, s. 2, power was given to the Queen, on the advice of the Privy Council, to divide the whole of the country into districts, and by Orders in Council of the 9th March 1847, England, with the exception of the city of London, was divided into 491 districts; since that date the districts have been from time to time altered and additional Courts established by like orders. In 1888 the then existing County Court dis-

tracts were continued (s. 2), with power for Her Majesty by Order in Council to alter the number and boundaries of the districts and the place where Courts shall be held (s. 4).

The districts of the superintendent registrars of births, etc., were taken as the basis upon which the County Court districts were formed. Since the County Courts Act, 1888, a County Court may be said to exist in and for the city of London (ss. 185, 186).

Court-Houses.—The Commissioners of Works, with the approval of the Treasury, must provide by purchase or otherwise such court-houses and offices as may be necessary for carrying on the business of any County Court (33 & 34 Vict. c. 15, s. 4); for that purpose, subject to certain restrictions, they may make use of every court-house or other public building vested in any public body without any charge for rent, paying, however, a reasonable charge for lighting, warming, and cleaning (s. 179). The expenses incidental to the carrying on of the Courts are to be paid out of moneys provided by Parliament for such purpose (s. 181).

Sittings.—Courts need not be held in September unless the Lord Chancellor otherwise orders, and with his sanction September may be altered for some other month; with this exception, once at least in every calendar month, or at such other interval as the Lord Chancellor may appoint, a Court must be held within each district (s. 11).

Judge and Officers.—The judge, who must be a barrister of at least seven years' standing, is appointed by the Lord Chancellor, except where the whole of the district is within the Duchy of Lancaster, when the Chancellor of that Duchy appoints; he cannot sit in Parliament, nor can he practise or act as arbitrator for remuneration to himself. The judge, in case of illness or unavoidable absence, may appoint a deputy, but no deputy can act for more than fourteen days at a time without the approval of the Lord Chancellor. The judge is paid by salary, and receives an allowance for travelling expenses (s. 23); is addressed as "His Honour" prefixed to the word "judge," and ranks next after knights bachelors (Royal Warrant, 4th August 1884).

Treasurers were appointed, to the number of twenty-three, to audit the accounts of the registrars; but since 1866 vacancies in the office have not been filled up, and their duties are now discharged by the County Court Department of the Treasury.

Registrars.—One registrar at least is appointed to each Court, and can only be a registrar of one Court; he must be a solicitor of at least five years' standing, and is appointed by the judge, subject to the approval of the Lord Chancellor; and if appointed after 23rd April 1866 must, on a vacancy in the office of high bailiff, exercise its powers and duties, unless the Chancellor otherwise determines (s. 37). Where the plaintiffs in the year preceding a vacancy exceed 8000, the Chancellor may make it a condition of the appointment that the registrar shall not practise as a solicitor.

The registrar must keep an office at each place where the Court of which he is registrar is held, which must be opened every week-day, except on certain appointed days (Order 1, r. 3). As to the registrar's duties out of Court, see secs. 26, 28; those in Court are governed by secs. 90, 92. With the approval of the judge, the registrar may from time to time appoint as a deputy any person qualified to be appointed registrar; in case of the registrar's inability to appoint, the judge may appoint (s. 31).

The registrar is remunerated by salary (see s. 45), calculated, up to 6000 plaintiffs, on the number of the plaintiffs entered; when the plaintiffs exceed 6000, the amount of salary is fixed from time to time by the Treasury,

with the concurrence of the Lord Chancellor. He is also entitled to receive for his own use divers fees under certain special statutes, *e.g.* Friendly Societies Act, 1896, Admiralty Jurisdiction Acts, etc.

High Bailiff.—Since the 23rd April 1866, upon a vacancy, the registrar must perform the duties of high bailiff (s. 37); he may by writing appoint bailiffs to assist him, and may at his pleasure dismiss them and appoint others; the judge also has power to suspend or dismiss any bailiff (s. 33).

The high bailiff's duties are defined (s. 35), and principally consist in serving the summonses and orders and executing all the warrants issued out of the Court; he is made responsible for the acts and defaults of himself and his officers (s. 37). The remuneration is by salary and allowances; he is also entitled to retain for his own use the fees received for keeping possession of goods under executions; the salary received by the registrar as high bailiff equals one-fifth of his net salary as registrar.

The treasurer, registrar, and high bailiff of every Court is obliged to give such security as the Treasury may order (s. 40); they are also subject to certain disabilities, and made answerable for certain defaults (ss. 41, 49, 50, 51), and are entitled to certain statutory protection (ss. 52, 54, 55, and Public Authorities Protection Act, 1893).

No officer may by himself or his partner act directly or indirectly as solicitor for any party in the Court, subject to a penalty of £50 (s. 41).

For detailed particulars of the duties of the said officers, of their liabilities for acts and offences, and of the protection afforded to them as such, see the *Annual County Court Practice* for the then current year; their duties are from time to time varied.

Contempt, Offences, etc.—As to contempt, see article CONTEMPT, *ante*, p. 314.

Perjury.—Under sec. 19 of 14 & 15 Vict. c. 100, the judge may, in case it appears to him that any person has been guilty of perjury, direct a prosecution for perjury, and commit such person for trial at the next assizes of the county within which the perjury was committed.

Forgery.—Any person who forges or knowingly serves or enforces any forged process, or any paper falsely purporting to be a summons or other process of the Court, is guilty of felony (s. 180).

JURISDICTION UNDER THE COUNTY COURTS ACT, 1888.—*As of Right.*—The ordinary jurisdiction extends to all personal actions where the debt, demand, or damage claimed, whether on balance of account or otherwise, does not exceed £50 (s. 56); and further, to any action (a) where the debt or demand claimed is reduced by an admitted set-off to £50 (s. 57); (b) for the recovery of any demand not exceeding £50, which is the whole or part of the unliquidated balance of a partnership account, or of a distributive share under an intestacy or of any legacy (s. 58); (c) in ejectment, where neither the value of the lands, etc., claimed nor the rent thereof exceeds £50 by the year, subject to the defendant or his landlord having the right to apply, within one month, to a judge of the High Court to order such action to be tried in the High Court in any case where the title to other lands, etc., of greater annual value than £50 would be affected (s. 59); (d) to try the title to any corporeal or incorporeal hereditament, where neither the value of the lands, etc., or the rent payable, or in case of an easement or licence, where neither the value nor reserved rent of the lands, etc., in respect of which, or on, through, over, or under which such easement or licence is claimed, shall exceed the sum of £50 by the year (s. 60): but does not extend *as of right* to any action (1) in which the title to any toll, fair, market, or franchise shall be in question, (2)

for libel or slander, (3) for seduction, or (4) for breach of promise of marriage (s. 56). The above is, however, subject to this proviso, that where the claim if in contract is over £20, or if in tort is over £10, the defendant may, by giving security to be approved by the registrar, and obtaining the certificate of the judge that some important question of law or fact is likely to arise, cause the action to be stayed (s. 62), when the plaintiff must proceed by writ in the High Court.

By Consent in writing, signed by the parties or their solicitors, jurisdiction is given in any action in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise *incidentally* comes in question; but the judgment of the Court shall not be evidence of title between the parties or their privies in any other action, nor shall such consent prejudice any right of appeal (s. 61).

By Agreement.—Jurisdiction is given in all actions assigned to the Queen's Bench Division, where the parties agree by a memorandum signed by them or their solicitors that a named Court shall have jurisdiction (s. 64).

By Order—in Contract.—In any action in the High Court where the claim on the writ does not exceed £100, or where by payment, admitted set-off, or otherwise, it is reduced to a sum not exceeding £100, either party may, if the claim or part thereof is contested, apply at chambers for an order that such action be tried in the County Court in which the action might have been commenced, or in any Court convenient thereto, and the judge shall, unless there be good cause to the contrary, make the order. The plaintiff must lodge the original writ and order with the registrar of the Court named, who shall appoint a day for the trial (s. 65).

In Tort.—Any defendant in any such action brought in the High Court who can make an affidavit that the plaintiff has no visible means of paying his costs, may obtain at chambers an order that, failing the plaintiff giving security for the defendant's costs, or satisfying a judge of the High Court that he has a cause of action fit to be prosecuted in the High Court, the action be remitted to a County Court named in the order. When the order is made, the plaintiff must lodge the writ and order with the registrar of the Court named, who shall appoint a day for the trial (s. 66).

In Interpleader.—Where the amount or value of the matter in dispute in any interpleader proceeding pending in the High Court does not exceed £500, and it appears to the Court or judge that it may be more conveniently tried in a County Court, the proceedings may be transferred by order to any County Court in which an action or proceeding might have been brought by any one or more of the parties against the others or other of them, if there had been a trust to be executed concerning the matter in question (Judicature Act, 1884, s. 17).

Jurisdiction in Equity.—The County Court has all the powers and authority of the High Court in the actions and matters following s. (67), viz.:—

Administration action by creditors, legatees, devisees, heirs-at-law, or next-of-kin, in which the personal and real estate against or for an account or administration of which the demand may be made, does not exceed in amount or value £500.

The execution of trusts where the estate or fund does not exceed in amount or value £500.

Foreclosure or redemption, or for enforcing any charge or lien where the mortgage charge or lien shall not exceed in amount £500.

For specific performance of, or the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of property, where the purchase money or, if a lease, the value of the property, shall not exceed £500. Notwithstanding the repeal of Lord Cairns' Act (21 & 22 Vict. c. 27), in an action for specific performance, damages (since the Judicature Act, 1873) may be given either in addition to, or in substitution for, such relief (*Chapman v. Auckland Union*, 1889, C. A., 23 Q. B. D. 294; 58 L. J. Q. B. 504; 61 L. J. 446).

*Under the Trustee, and the Trustee Relief Acts, or under any such Acts where the trust estate or fund shall not exceed in amount or value £500 (see *infra*, Trustee Act, 1893).*

Relating to the maintenance or advancement of infants where the property of the infant does not exceed in amount or value £500.

For the dissolution or winding up of any partnership in which the assets shall not exceed in amount or value £500.

Actions for relief against fraud or mistake where the damage sustained or the estate or fund involved does not exceed in amount or value £500.

In any of the above-mentioned actions and matters the officers of the County Court shall discharge any duties which the officers of the Chancery Division could discharge (s. 67). In equity actions and matters, jurisdiction cannot be extended or given by consent, but if during the progress of any action or matter the want of jurisdiction appears, it is the duty of the judge to direct the transfer of the action or matter to the Chancery Division of the High Court (s. 68). A judge of the said Division at chambers has power, at the instance of any party, to make an order authorising the action or matter to be prosecuted in the County Court. So also a judge of the said Division at chambers can transfer to the County Court equitable actions and matters which might have been commenced therein (s. 69).

Trustees may pay trust moneys or transfer stock and securities not exceeding in amount or value £500 into the County Court (s. 70), such money to be paid into a post-office savings bank in the town where the Court is held, in the name of the registrar; stocks and securities to be transferred or deposited in the names of the treasurer and registrars of the Court, the acknowledgment of the payment or the certificate of the transfer or deposit shall be a sufficient discharge (see also Trustee Act, 1893, *infra*).

Jurisdiction in Replevin.—The County Court has now jurisdiction in all cases of replevin (s. 134), notwithstanding questions of title being raised, unless the plaint is removed by *certiorari* (s. 137) into the High Court (*Fordham v. Akers*, 4 B. & S. 578; 33 L. J. Q. B. 67). The power to grant replevin is now given exclusively to the registrars of County Courts. When goods have been seized, the claimant, the replevisor, must, as soon as possible, and before sale, give notice of his intention to replevy to the registrar of the County Court of the district in which the goods have been seized, stating whether his action of replevin is to be commenced in the County Court or in the High Court; if he intend to give a bond, he must name his sureties; if to make a deposit, his willingness to deposit money as security.

The registrar then gives notice to the seisor (Form 243), if he desires to object to the proposed sureties, to attend on the day therein named. If the replevisor wishes to commence his action of replevin in the High Court, he must give the security, to be approved by the registrar, with the conditions required by sec. 135 (see Form 244); if in the County

Court, the security, subject to the like approval, with the conditions required by sec. 136 (see Form 245).

After the security has been completed and the goods replevied, the replevisor must proceed with his action of replevin according to the condition of his security; if in the County Court, his plaint must be entered in the Court of the district wherein the goods were seized (s. 133), and no other cause of action may be joined (Order 34, r. 1); with the plaint particulars must be delivered and the action thenceforward proceeded with in the ordinary way.

At the instance of the defendant, upon complying with sec. 137, the action of replevin may by *certiorari* be removed to the High Court.

Recovery of Tenements, Actions for.—Where the term and interest of the tenant of any corporeal hereditament, where neither the value nor the rent exceeds £50 by the year, and upon which no fine or premium has been paid, has expired or been determined by notice, the judge has power, unless the defendant show good cause to the contrary, to order possession to be given by the defendant to the plaintiff on or before a certain day, and if such order be not obeyed, the registrar shall issue a warrant requiring the bailiff to give possession of such premises to the plaintiff. The plaintiff may add a claim for rent or mesne profits, or both, down to the day of hearing, provided the same does not exceed £50 (s. 138).

Where the rent of any corporeal hereditament, where neither the value nor the rent exceeds £50 by the year, is half a year in arrear, and the landlord has the right to enter for non-payment thereof, he may, without any formal demand or re-entry, enter a plaint in the County Court of the district for the recovery of the premises; if the tenant, five clear days before the return day, pay into Court all the arrears and costs, the action shall cease; if otherwise, unless good cause be shown to the contrary, and on proof that no sufficient distress was then to be found on the premises to countervail such arrears, the judge may order possession of the premises to be given by the defendant to the plaintiff on some day not less than four weeks from the hearing, unless all arrears and costs are paid into Court; and if the order be not obeyed, the registrar shall issue a warrant requiring the bailiff to give possession of such premises to the plaintiff, and the defendant and all persons claiming through or under him shall be barred (s. 139).

* *The Judicature Acts* extend the jurisdiction of the County Court. By sec. 89 of the Judicature Act, 1873, such Court shall, in any proceeding (*i.e.* action or suit—*Iryor v. City Offices Co.*, 1883, 10 Q. B. D. 504), grant such relief or remedy or combination of remedies, and give effect to every ground of defence or counter-claim, equitable or legal, in as full and ample a manner as if the action were in the High Court; hence the power of the Court to grant a mandamus or an injunction, and to appoint a receiver. Sec. 90 of the said Act provides that a defence or counter-claim involving matter beyond the jurisdiction of the Court shall not prevent the Court disposing of the whole matter, so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to grant is to be given to the defendant; a judge of the High Court may, however, order, on the application of any party, that the whole proceeding be transferred to the High Court. The Judicature Act, 1884, s. 18, provides that in cases of counter-claim jurisdiction shall not be excluded (1) where any such counter-claim involves matter not within the local jurisdiction of the Court, if within the jurisdiction of any other inferior Court in England;

(2) where the counter-claim involves more than one separate cause of action, each such cause of action being within the jurisdiction of the Court, though the aggregate amount of the counter-claim may exceed the same; (3) where the counter-claim being for an amount of money exceeding the jurisdiction of the Court, that the plaintiff has not objected in writing within the prescribed time, *i.e.* two clear days after the receipt of notice of counter-claim (Order 10, r. 3); where the counter-claim involves matter beyond the jurisdiction, the Court may adjourn the hearing, or stay execution, to enable an application to be made to the High Court, and in default of such application shall, after the expiration of the time limited, have jurisdiction to hear and determine the whole matter.

Interpleader.—The power given by the Judicature Act, 1884, s. 17, to transfer interpleader issues to the County Court for trial has been already noticed. The County Court has, by virtue of sec. 89 of the Judicature Act, 1873, power to compel claimants to interplead when, but only when, rival claims are raised to any debt, chose in action, money, goods or chattels, with reference to which a proceeding is then pending before such County Court (Order 27, r. 13 *a*). In the High Court an applicant who has not been sued, but who expects to be sued by two or more parties, may, by an originating summons, compel them to appear and maintain or relinquish their claim (Order 57, R. S. C.); but in the County Court there is no procedure analogous to an originating summons, hence the limitations of the power of the Court.

An appeal lies as in other cases where the money claimed or the value or proceeds of the goods seized exceed £20, without leave; if below £20, with leave (s. 120).

As to interpleader by high bailiff, see *post*, p. 539.

JURISDICTION OF HIGH COURT OVER COUNTY COURT.—*Certiorari*—*Removal by—into High Court.*—By sec. 126, the High Court or a judge thereof may order the removal by writ of *certiorari* into the High Court of any action or matter, upon such terms as to payment of costs, giving security, and otherwise, as the Court may seem just; except where the action is one over which the County Court has exclusive jurisdiction (*In re Royal Liver Friendly Society*, 1887, 35 Ch. D. 332). The order to show cause why a writ of *certiorari* should not issue shall, if so directed, operate as a stay of proceedings; the writ when granted ought to be sent to the registrar at least two clear days before the trial (s. 130). The usual ground on which actions are removed by *certiorari* is that difficult questions of law will arise at the trial; the difficult question likely to arise should be of general importance, and not merely of importance to one of the parties. If the order is refused, sec. 132 gives an appeal, but no right to apply for an order on the same grounds to another judge. See *CERTIORARI*, vol. ii. pp. 421, 422.

Prohibition.—By sec. 127 a judge of the High Court, whether during sittings or in vacation, may determine applications for prohibition; the application is to be finally disposed of by order, and no declaration or further proceeding is allowed (s. 128); if so directed by the Court, the summons to show cause shall operate as a stay (s. 129). A prohibition is granted when a County Court acts without or in excess of jurisdiction. Crown Office Rules, 1886, r. 81, directs the application to be made to a Divisional Court for an order *nisi*, or by summons before a judge at chambers. If the application is refused, sec. 132 gives an appeal, but no right to make an application, on the same grounds to another judge. See **PROHIBITION**.

Mandamus.—When a Court declined to exercise its jurisdiction, the common law remedy was by a writ of mandamus issued from the Queen's Bench; but sec. 131 substitutes a simpler proceeding, namely, an order calling upon the judge or officer of the County Court to show cause why the required act should not be done.

The application should be made *ex parte* to a Divisional Court (not to a single judge, whether sitting in court or chambers) for an order *nisi*, and should be made within a reasonable time (Crown Office Rules, 1886, r. 80). If the order is refused, there may be an appeal, but otherwise no judge can grant a writ once refused (s. 132). See MANADAMUS.

Penalty for suing in the High Court instead of County Court.—In any action brought in the High Court which could have been commenced in a County Court, if the plaintiff, in an action founded on contract, recovers less than £20, he is entitled to no costs; if he recovers £20 but not more than £50 (R. S. C., Order 65, r. 12; *Millington v. Harwood*, [1892] 2 Q. B. 166; 61 L. J. Q. B. 582; 40 W. R. 481; 66 L. J. 576), he is entitled to County Court costs only; if in action founded on tort he recovers less than £10, he is entitled to no costs; if he recovers £10 and less than £20, he is entitled to County Court costs only (s. 116). There are, however, two exceptions—(1) where a judge of the High Court certifies that there was sufficient reason for bringing the action in the High Court, or at chambers by order allows costs; (2) where the plaintiff within twenty-one days after the service of the writ obtains judgment, under Order 14, R. S. C., for £20 or upwards.

PROCEDURE AND TRIAL.—*Action—how and where commenced.*—A plaintiff desiring to sue in the County Court must file a *præcipe* containing the information required by Order 5, rr. 4 *a*, 5, 5 *a*; this may be done by post (*ibid.* r. 8); thereupon the registrar enters the plaint in a book kept in the office. A summons stating the names of the parties and the substance of the action is issued under the seal of the Court, which must be served the prescribed number of days before the return day, *i.e.* the day named therein for the defendant to appear (s. 73).

The action may be commenced in the Court where the defendant resides or carries on business, or by leave of a judge or registrar in the Court within the district of which the defendants or one of them lived or carried on business within six months, or with the like leave in the Court of the district where the cause of action wholly or in part arose (s. 74); provided that any proceedings relating to the recovery of a charge or lien on lands, etc., or to partition, or to proceedings under the Trustee Acts, or to the administration of the assets of a deceased person, or to any partnership, shall be respectively commenced in that Court within the district of which the lands, etc., or any part thereof, are, or the persons making the application under the Trustee Acts reside, or the deceased last lived, or the partnership business was carried on (s. 75).

Where the claim is for a debt or liquidated demand, the plaintiff, if not suing as an assignee (Order 5, r. 5 *b*), may in lieu of the summons above mentioned issue a default summons (s. 86), which is obtained by filing an affidavit verifying the debt; if the amount claimed exceeds £5, or is for the price of goods sold or let on hire to the defendant in the way of his trade, no leave is required; in other cases, leave must be obtained (s. 86, subs. 6).

Causes of action may not be divided and more than one action brought; but if the plaintiff's claim exceeds £50, the excess may be abandoned and judgment up to £50 obtained in full discharge of the cause of action.

Service of Summonses: Appearance.—An ordinary summons may be served

either personally or on any person apparently not less than sixteen years of age, at the residence or place of business of the defendant (Order, 7, r. 9 a); a default summons must be served on the defendant personally (s. 86); if the defendant to a default summons within eight days does not give written notice, signed by himself or his solicitor, of his intention to defend, the plaintiff may, after eight days, and within two months of service upon proof of service, sign judgment for debt and costs. To an ordinary summons there need be no appearance or notice of defence (except of the specified defences hereinafter mentioned) until the return day.

Notice of Defence or of Counter-claim.—If the defendant relies upon a counter-claim, or upon any one or more of the following defences, viz.: infancy, coverture, Statute of Limitations, release in bankruptcy, that libel or slander is true, or on facts in mitigation of damages therein, statutory defence, equitable defence, or tender, he must, five clear days before the return day, file a concise statement of the same (s. 82, Order 10, rr. 10–20). This also applies to defences to counter-claims where the counter-claim is delivered a sufficient time before the return day, to allow the plaintiff with reasonable expedition to do so (Order 10, r. 21). A defendant may also, five clear days before the return day, claim contribution or indemnity from any person not a party to the action (Order 11).

The defendant may also pay money into Court (s. 107); this ought to be done at least five clear days before the return day, and the money paid in should include, except under a defence of tender, a sum for Court fees and solicitor's costs; this payment may be either without or (except in cases of libel and slander) with a denial of liability (Order 9, r. 11 (1)); within twenty-four hours the registrar is to send notice of the payment (Order 9, r. 11 (2)). Money may also be paid into Court less than five days before the return day, but then, except with leave, liability cannot be denied, and, unless the Court otherwise orders, plaintiff may proceed and recover his costs even though he obtain judgment for less than the sum paid in (Order 9, r. 11 (3)). The acceptance of money paid in and the consequences as to costs is provided for by Order 9, r. 12 a.

Practice, etc.—Consolidation of actions is governed by Order 8; discontinuance, by Order 9; claims for contribution and indemnity, by Order 11; interlocutory and interim orders and proceedings, by Order 12; amendment, by Order 14; applications for directions, by Order 15; discovery and inspection, by Order 16; accounts and inquiries, by Order 24; for procuring the attendance of witnesses by secs. 110, 111, by Order 18, rr. 1–8; and for admission of facts, by Order 9, rr. 7, 8.

Jury.—In every action, except actions of the nature of the causes or matters assigned to the Chancery Division of the High Court, in which the claim exceeds £5, either party may require a jury; in claims under £5 the judge may in his discretion order that the action be tried by jury (s. 101, Order 22, rr. 1–4 a). The jury consists of five persons summoned from those qualified and liable to serve as jurors at the assizes (s. 102). On the application of either party, the judge may summon persons of skill in the matter to which the action relates to act as assessors (s. 103).

In all causes and matters where there is no jury, the judge decides both the issues of fact and law.

Admitting Claim before Return Day.—The Act and Rules contain provisions by which defendants confessing the plaintiff's claim before the return day may save half the hearing fee and subsequent costs for which they would otherwise be ultimately liable (ss. 98, 99, Order 9, rr. 2–6).

Fees.—By sec. 165 the Treasury may from time to time, with the consent

of the Lord Chancellor, make orders as to the fees to be paid on any proceedings; these fees are now regulated by orders made on the 1st January 1889 and 3rd May 1895, and are divided into Schedules A and B; the former are received by the registrars to be accounted for and paid over to the superintendent of County Courts; the later for their own use and for the use of the high bailiff, according to the duties respectively performed; the said schedules will be found in the *Annual County Court Practice*, vol. i. ch. v.

PROCEDURE ON RETURN DAY.—*Who may appear to plead.*—A party to an action or matter may appear and address the Court in person, or by a solicitor acting generally in the action or matter for such party, or by a barrister, or by leave of the judge by any other person allowed by the judge to appear instead of such party, but he may not appear by a solicitor retained as an advocate by the solicitor acting generally in the matter (s. 72). Cp. ADVOCATE.

Hearing.—Before a cause is heard the hearing fee must be paid, viz. 2s. in £ up to £20; when the claim exceeds £20 the fee is payable on that sum only. If the plaintiff, before or in his opening, abandons part of his claim, the fee is charged on the reduced amount only; where the defendant personally or by letter admits the claim, one-half the hearing fee is returned to the plaintiff (Schedule of Fees, A).

If neither party appears, the case will be struck out; if the defendant appears and does not admit the claim, and the plaintiff does not appear, the case shall be struck out (s. 88), and the defendant may be awarded costs (s. 89); but though the plaintiff does not appear the defendant may admit the claim to the full amount, pay the fees, and have judgment against him as if the plaintiff had appeared (s. 88); if the plaintiff appears and the defendant does not appear in any action where plaintiff has proceeded on a default summons, judgment may be entered by the judge without further proof; in any other action founded on contract, the registrar may, by leave of the judge, upon proof of service of the summons and of the debt, enter up judgment for the plaintiff, and make an order for payment by instalments; or he may direct judgment of non-suit or strike out the case, and, subject to the judge's power to grant a new trial, such judgment shall be final (s. 90); in any action of tort the like powers may be exercised by the judge (s. 91).

Where both parties appear, the registrar, at the request of the parties and by leave of the judge, may hear and determine any disputed claim up to £2 (s. 92); this leave may be general or special (Order 22, r. 20).

• The trial as to the right to begin, the calling and cross-examination of witnesses, and the speeches of advocates, is conducted as in the High Court, except that the defendant's advocate seems not to have the right to make two speeches.

Want of jurisdiction. unless the parties consent to give jurisdiction, compels the Court to strike the action or matter out, but the Court may nevertheless award costs as if it had jurisdiction (s. 114). Treble costs shall be adjudged to be paid by any party who is proved to have already sued and obtained judgment in any other Court (s. 115).

As to costs, see COSTS, *ante*, p. 511 and *passim*.

APPEALS TO HIGH COURT.—No appeal lies where parties agree not to appeal (s. 123).

By sec. 120 an appeal may be brought by any party in any action or matter against the determination or direction of the judge in point of law or equity, or upon the admission or rejection of evidence. At the trial the judge should be requested to take a note of any question of law raised, of the facts in evidence relating thereto, and of his decision thereon; provided such request has been made, there is an appeal—

Without Leave: (1) In all equity actions or matters; (2) in all actions of ejectment, but see *Shrewsbury v. Garfield*, 60 L. J. Q. B. 765; 65 L. J. 748, *contra*, decided, however, without the attention of the Court having been properly directed to the distinction between "ejectment" and "recovery of tenements"; (3) in all actions in which the title to any corporeal or incorporeal hereditament comes in question; (4) in all actions where the parties by agreement give jurisdiction; (5) in contract or tort where the debt or damage claimed exceeds £20; (6) in replevin where the rent or damage or the value of the goods seized exceeds £20; (7) in actions for the recovery of tenements where the rent or value of the premises exceeds £20; (8) in interpleader where the money or the value of the goods and chattels or the proceeds thereof claimed exceeds £20.

By Leave: In the actions and matters (5), (6), (7), (8) mentioned above, whatever the amount claimed might be.

Interlocutory orders have been held to be subject to an appeal to the High Court since the 1888 Act (*Gilson v. Kilner*, 69 L. J. 310).

Appeals generally.—The words of sec. 120 are wide enough to include the very numerous cases in which jurisdiction is given by special statutes, and in *The Delano*, [1895] Prob. 40; 64 L. J. P. 8; 71 L. J. 544; 43 W. R. 65, the Court of Appeal has decided that the section (subject to the limitations therein contained) gives an appeal in every action or matter that may come before a County Court, unless the Court is satisfied that the words of sec. 120 were intended by the Legislature to be cut down. As to the manner of bringing the appeal, it would seem that even when the special Act gives an appeal by special case, there is also an appeal by notice of motion under R. S. C., Order 59, rr. 10, 18 (*Kirkheaton Local Board v. Ainley*, [1892] 2 Q. B. 274; 61 L. J. Q. B. 812; 41 W. R. 99; 67 L. J. 209).

*Appeal—procedure on—*under the County Courts Act, 1888, and under such special statutes as allow an appeal, is regulated by R. S. C., Order 59, rr. 9–18.

Security for costs of appeal may be ordered by the Divisional Court where the appellant or the next friend of the appellant is insolvent (*Swain v. Fellows*, 1887, 18 Q. B. D. 585; 56 L. J. Q. B. 310; 56 L. T. 335; 35 W. R. 408).

New Trial.—Where judgment is given in the defendant's absence, the judge may grant a new trial on such terms as he thinks fit (s. 91). The judge may also by sec. 93 in every case whatever, if he shall think just, order a new trial to be had upon such terms as he shall think reasonable, and in the meantime stay the proceedings; but notwithstanding the generality of these words, a new trial can only be granted on grounds which would be sufficient in law for granting a new trial in the High Court (*Murtagh v. Barry*, 1890, 24 Q. B. D. 632; 59 L. J. Q. B. 388; 38 W. R. 526).

Order 31 provides the practice to be followed on the application for a new trial; these Rules, as to notice at any rate, are only directory (*Carter v. Smith*, 1855, 4 El. & Bl. 696; 24 L. J. Q. B. 141).

Judgment, if reserved, dates from the day of delivery, and not from the day of trial; and, subject to the right of appeal to the High Court, and the power of the judge to grant a new trial, all orders and judgments are final between the parties. All ordinary judgments and orders are entered by the registrar in the minute-book (Order 23, r. 1); judgments and orders against married women being entered as in the Superior Courts (Order 23, r. 1a). Special judgments or orders, if not agreed upon by the parties, must be settled by the registrar, subject to the right to apply to the judge to vary the same (Order 23, r. 2).

Any judgment or order for the payment of money or costs must, subject to any special order of the judge, be prepared by the registrar, and delivered to the bailiff, who shall post or otherwise send the same within twenty-four hours to the party to be served (Order 23, r. 5).

Where judgment has been obtained for a sum not exceeding £20, exclusive of costs, the order may be for payment by instalments; but in other cases, except the plaintiff consents to an order by instalments, payment shall be ordered forthwith, or within fourteen days; all moneys, whether payable in one sum or by instalments, shall be paid into Court, not to the plaintiff (s. 105).

Instalments are payable as directed; if no direction, then the first is payable in twenty-eight days, and every successive instalment after a like period (Order 23, r. 8 a).

The plaintiff may at any time after judgment obtain an order from the judge or registrar, *ex parte* for payment by instalments, or renewing or diminishing the instalments payable under a previous order (Order 23, r. 14).

A judgment in the County Court does not carry interest *J. v. Essex C. C. (C. A.)*, 1887, 18 Q. B. D. 704; 56 L. J. Q. B. 315; 57 L. T. 643; 35 W. R. 511).

If default is made in payment of an instalment, execution may issue for the whole sum, including costs, remaining due; but until default in the payment of some instalment no execution can issue (s. 149).

Sec. 153 enables the judge, at any time, if the defendant from sickness or other sufficient cause is unable to pay the debt, damage, or instalment, to suspend judgment and execution; but mere inability to pay owing to want of means is not such a sufficient cause (*Attenborough v. Henschel*, [1895] 1 Q. B. 833; 64 L. J. Q. B. 255; 43 W. R. 283; 72 L. T. 192).

ENFORCING JUDGMENTS AND ORDERS.—(a) *By Execution against Goods.*—Leave is required (1) where no payment into Court has been made by judgment debtor within twenty-four months, but leave may be obtained without notice to debtor (Order 25, r. 6); (2) where on a judgment against a firm the creditor claims to issue execution against a person, as partner, who has neither admitted that he is, nor has been adjudged to be one; if the alleged debtor disputes liability, the question of liability must be decided by the Court on motion (Order 25, r. 8); (3) where there has been a change after judgment, by death, assignment, or otherwise, in the parties entitled or liable to execution (Order 25, r. 9 a (1)); (4) where a husband is entitled or liable to proceedings upon a judgment or order for or against his wife (Order 25, r. 9 a (2)); (5) where a party is entitled to execution against any of the shareholders of a joint-stock company, or against a public officer or other person representing such company (Order 25, r. 9 a (3)). In the last three cases leave may be applied for by affidavit, and an order may be granted by either judge or registrar, or an issue directed on terms to determine the rights of the parties (Order 25, r. 9 a).

The issue of the "warrant of execution in the nature of a writ of *fieri facias*" to the high bailiff, and the formalities to be observed, are provided for by sec. 146.

What goods may be taken in execution sec. 147 decides; sec. 148 provides how securities are to be dealt with; sec. 154, how goods are to be sold; sec. 155, how execution can be superseded on payment of debt and costs; sec. 156, what the bailiff is to do when any claim made to the goods

seized. Under this last section it has been decided that where the claimant does not make the deposit or give the security required by the section, and the bailiff sells, the purchaser obtains a good title to the goods, although they were the property of the claimant at the time of the seizure (*Goodlock v. Cousins* (C. A.), [1897] 1 Q. B. 558; 66 L. J. Q. B. 360; 45 W. R. 369; 76 L. T. 313). The claims of the landlord for rent out of goods taken in execution is governed by sec. 160, as 8 Anne, c. 14, s. 1, does not apply to goods taken in execution under the warrant of this Court.

Interpleader where claims are made to goods taken in execution is regulated by sec. 157, and by Order 27, excepting r. 13 *a*, which has already been noticed, *ante*, p. 534.

Attachment of Debts.—By Order 25, r. 52, a creditor who has obtained judgment or an order for the payment of money may apply for the oral examination of the judgment debtor, and may, either before or after such examination, take garnishee proceedings to attach all debts owing to the debtor, such proceedings being regulated by Order 26 *a*.

Prior to the passing of the County Courts Act, 1888, there was no appeal against a garnishee order (see *Beswick v. Boffey*, 9 Ex. Rep. 315; 23 L. J. Ex. 89, and *Mason v. Wirral Highway Board*, 4 Q. B. D. 459; 48 L. J. Q. B. 679; 27 W. R. 676); but sec. 120, and the interpretation given to "party" by sec. 186, seem undoubtedly now to give an appeal in the cases mentioned in sec. 120.

Equitable Execution.—The County Courts have now, by virtue of sec. 89 of the Judicature Act, 1873 (except as regards interests in land), the same power of appointing a receiver by way of equitable execution as is vested in the High Court; but a receiver ought only to be appointed when it is just and convenient and when there is some hindrance to obtaining ordinary execution by ordinary legal means (*The Manchester and Liverpool District Banking Company Limited v. Parkinson* (A. C.), 1888, 22 Q. B. D. 173; 58 L. J. Q. B. 262; 37 W. R. 264). If it is desired that land may be extended to satisfy the judgment, if over £20, must be removed into the High Court, when it will have the same force as a judgment of the High Court. The practice as to receivers is governed by Order 13.

Execution against Land and specific Chattels.—A judgment or order for the recovery of land is to be enforced by warrant of possession (Order 25, rr. 45–49); for the recovery of specific chattels by warrant of delivery (*ibid.* rr. 50, 51); see also sec. 52 of the Sale of Goods Act, 1893, and Forms 254, 255, framed under the repealed provisions of the Mercantile Law Amendment Act, 1856.

Imprisonment of Debtor.—The jurisdiction to commit can only be exercised where it is proved that the debtor has or has had since the date of the order or judgment the means to pay the sum as to which he is in default. The practice in the County Court as to the issue, service, and hearing of judgment summonses is regulated by Order 25, rr. 13–39 *a*. See also DEBTORS ACT, *post*, and BANKRUPTCY, *ante*.

Attachment of the Person for Contempt.—The remedy by attachment is applicable to cases under sec. 4 of the Debtors Act, but is also one of the means of enforcing obedience to all orders of the Court, whether final or interlocutory. See article CONTEMPT OF COURT, *ante*, p. 314.

The jurisdiction given by statutes other than the County Courts Act, 1888, is so varied, being in some cases exclusive, in others exclusive only up to a named sum; in some concurrent with the High Court, in others concurrent with justices; in some limited in amount, in others unlimited; that it has been thought best to treat of these statutes alphabetically.

• As to appeals in matters decided under these statutes, see Appeals generally, *ante*, p. 537.

• The statutes enumerated in the following alphabetical list are dealt with only in so far as they bear on County Court jurisdiction.

ADMIRALTY JURISDICTION.—The County Courts Admiralty Jurisdiction Act, 1868, c. 71; the County Court Admiralty Jurisdiction Amendment Act, 1869, c. 51; Merchant Shipping Act, 1894, c. 60.

A very limited jurisdiction in Admiralty was conferred upon County Courts by the Merchant Shipping Act, 1862 (since repealed). It was not, however, until the passing of the above-mentioned 1868 Act that these Courts could be said to have had any real Admiralty and maritime jurisdiction. By that Act, on the representation of the Lord Chancellor, it was lawful, by Order in Council, to appoint any specified County Court to have such jurisdiction, and to assign to it, for Admiralty purposes, a district not necessarily coterminous with the district wherein it exercised its ordinary jurisdiction.

The jurisdiction so conferred has been extended by the 1869 Act and the Merchant Shipping Act, 1894.

For the names of the Courts from time to time appointed to have Admiralty jurisdiction, see the *Annual County Court Practice*. This part of this article deals, except where otherwise mentioned, with the jurisdiction of, and the practice and procedure of, such Courts only.

Salvage.—Suits for salvage can only be entertained in County Courts appointed to exercise Admiralty jurisdiction. The Merchant Shipping Act, 1894, s. 547, provides that disputes as to the amount of salvage, whether of life or property, and whether rendered within or without the United Kingdom (if not settled by agreement, arbitration, or otherwise), must be determined summarily (*ibid.* subs. 1), *i.e.* by a County Court having Admiralty jurisdiction (*ibid.* subs. 4), in any case (a) where the parties agree, (b) where the value of the property saved does not exceed £1000, (c) where the amount claimed does not exceed £300 (*ibid.* subs. 1; see also 1868 Act, s. 3, subs. 1); other disputes as to salvage shall be determined by the High Court. Any claimant, however, who in that Court fails to recover £300 is only entitled to costs when the Court certifies the case was fit to be tried otherwise than summarily (*ibid.* subs. 2).

For claims recoverable as salvage and for matters to be determined as disputes as to salvage, see Merchant Shipping Act, 1894, ss. 460, 513, 526, and 567.

Salvage, Apportionment of.—Whenever the aggregate amount of salvage payable has been finally ascertained and a dispute has arisen as to the apportionment thereof, there is jurisdiction in respect of services rendered in the United Kingdom to any amount exceeding £200; and in respect of services rendered elsewhere to any amount (Merchant Shipping Act, 1894, s. 556).

Towage and Necessaries.—The jurisdiction extends to claims not exceeding £150 (1868 Act, s. 3, subs. 2).

Wages.—Jurisdiction in claims for wages not exceeding £150, given by s. 3, subs. 2, of the 1868 Act, is now limited by the Merchant Shipping Act, 1894, s. 165. A County Court having Admiralty jurisdiction, except in the four following cases, namely, (1) where the owner of a ship is adjudged bankrupt; (2) where the ship is under arrest, or is sold by the authority of any Court having Admiralty jurisdiction; (3) where the Court of summary jurisdiction, under the authority of the Act, refers the claim; (4) where neither the owner nor the master of the ship is, or resides within, twenty miles of the place where the seaman or apprentice is discharged or put on shore, has no jurisdiction except in claims exceeding £50, but such claims can be recovered in a County Court under its ordinary jurisdiction. For the numerous claims recoverable as wages, see Merchant Shipping Act, 1894, ss. 171, 174, 186, 193, 208, 232, 387, 411.

Power to rescind Contracts.—These Courts, in common with other Courts, have power, as an addition to any other jurisdiction, in any proceeding between an owner or master of a ship and a seaman or apprentice to the sea service arising out of or incidental to their relation as such, or in any proceeding instituted for the purpose, to rescind any contract between the above-mentioned parties, when, having regard to all circumstances of the case, it is just to do so (*ibid.* s. 168).

Damage to Cargo and Ships.—The jurisdiction extends to claims not exceeding £300 (1868 Act, s. 3, subs. 3), even where the damage to ships is caused by collision (1868 Act, s. 4).

Dangerous Goods improperly sent, Forfeiture of.—Where dangerous goods are sent or carried, or attempted to be sent or carried, on board any vessel without being marked as provided, or without the provided notice, or under a false description, there is

jurisdiction to declare such goods to be forfeited, even though the owner of the goods has committed no offence under the Act, is not before the Court, and has had no notice of the proceedings, or when there is no evidence as to the ownership of the goods (the Merchant Shipping Act, 1894, ss. 446-450).

Use or Hire of Ships.—The 1869 Act, s. 2, confers jurisdiction as to claims made in relation to the use or hire of any ship, or to the carriage of goods in any ship, or as to any claim in tort in respect of goods carried in any ship, to any amount, where the parties by a signed memorandum agree to give jurisdiction to any specified County Court having Admiralty jurisdiction; otherwise, to an amount not exceeding £300. This jurisdiction has been held to extend to cases beyond the jurisdiction possessed by the Admiralty Division (*The Alina*, 1880, 5 Ex. D. 227).

Transfer actions commenced in the County Court may be transferred to the Admiralty Division on motion (1868 Act, s. 6); and if during the progress of an action it appears that it could be more conveniently prosecuted in some other County Court, or in the High Court, the judge may order it to be so transferred (*ibid.* s. 8).

Practice and procedure of County Courts having Admiralty jurisdiction is regulated by Order 39 B, made under the power given by sec. 35 of the 1868 Act.

Appeal.—There is no appeal where the parties by a memorandum agree that the decree shall be final (1868 Act, s. 28); but if no such agreement, on questions of law there is an appeal against a final decree or order, whatever the amount involved may be, as sec. 120 of the County Courts Act, 1888, overrides the provisions of ss. 26, 31, of the 1868 Act (*The Delano* (C. A.), [1895] Prob. 40; 64 L. J. P. 8; 43 W. R. 65; 71 L. T. 544); on questions of fact, however, the appellant has only the right of appeal given by the above-mentioned sections of the 1868 Act, namely, where the amount involved exceeds £50.

The appeal lies to the Admiralty Division of the High Court. In cases arising within the jurisdiction of the Cinque Ports the appeal may also be to the Court of Admiralty of the Cinque Ports (1868 Act, s. 33). If the Divisional Court alters the judgment of the County Court, an appeal lies as of right to the Court of Appeal (*The Dart* (C. A.), [1893] Prob. 33; 62 L. J. P. 32; 41 W. R. 153; 69 L. T. 251); otherwise no appeal lies from the Divisional Court without leave.

AGRICULTURAL HOLDINGS ACT, 1883, c. 61.—If for seven days after request from either party the referees appointed under sec. 9, subs. 6, fail to appoint an umpire, the County Court must within fourteen days appoint one (s. 9, subs. 9). Every appointment notice and request must be in writing (*ibid.* subs. 10). By consent of the parties the above powers may be exercised by the registrar (*ibid.* s. 11).

The costs of and attending the reference are subject to taxation by the registrar on the application of either party, and his taxation is subject to review by the judge (s. 20).

Appeals from Awards.—Where the sum claimed for compensation exceeds £100, either party may, within seven days after delivery of the award, appeal against it to the judge of the County Court on any of the four grounds set out in sec. 23; the judge has power to remit the case to be reheard; if no appeal, the award is final.

The practice, on the appointment of a referee or umpire and on appeals against awards, is governed by Order 40.

By sec. 23 the decision of the judge is final, but at the request of either party he must state a case on any question of law for the opinion of the High Court; the effect of the decision of the Court of Appeal in *The Delano*, [1895] Prob. 40; 71 L. T. 544, is believed to be that an appeal by notice of motion lies under sec. 120 of the County Courts Act to the High Court.

Recovery of Compensation.—Where any money agreed, or awarded, or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after it is due, it may be recovered upon order made by the judge, as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable (s. 24). Where the landlord is only entitled to the rents as trustee, the compensation is not recoverable against the landlord personally, but will be a charge on the holding (s. 31, subs. 1), which may be obtained in the County Court (*ibid.* subs. 3).

Charge on the Holding of the Compensation paid to Tenant.—A landlord, on paying to the tenant the amount due for compensation, or on expending money for improvements as provided by the Act, may obtain from the County Court a charge on the holding to the amount of the sum paid or expended (s. 29). Where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment may be made payable after the time when such improvement will have become exhausted (*ibid.*).

Disputes in respect (1) of any distress having been levied contrary to the Act; (2) as to the ownership of any stock distrained, or the price to be paid for feeding such

stock; (3) as to any other matter or thing relating to a distress on a holding to which the Act applies,—may be heard and determined by the County Court or by justices (s. 46). An appeal by notice of motion lies to the High Court from a decision under this section (*Hammer v. King*, 57 L. T. 367; *The Delano*, *supra*). As to the right of tenants of the mortgagor to compensation from mortgagees who take possession, see Tenants' Compensation Act, 1890, *post*, p. 552).

ALKALI WORKS REGULATION ACTS, 1881 AND 1892.—Sec. 22 of the 1871 Act gives the County Court elsewhere, and in the city of London and liberties thereof the Sheriff's Court, exclusive jurisdiction for the recovery of fines under these Acts. See *ALKALI WORKS, Recovery of Fines for Offences*, vol. i. p. 224.

ALLOTMENT AND COTTAGE GARDENS COMPENSATION FOR CROPS ACT, 1887, c. 26.—The award under this Act is final (s. 16), and not subject to appeal. The money and costs agreed or awarded to be paid, after fourteen days, are recoverable by an order of the County Court judge of the district as an ordinary debt. See also Tenants' Compensation Act, 1890, *post*, and LANDLORD AND TENANT.

ALLOTMENT EXTENSION ACT, 1882, c. 80.—In case of default under rule 2 in the schedule, the County Court of the district has jurisdiction to fix the time for giving the public notice, provided for by sec. 4, subs. (1). Under rule 4 in the schedule the said County Court judge may fix the time for giving the public notice, by trustees provided for by rule 3 in schedule.

ARMY ACT, 1881, c. 58.—By sec. 115 jurisdiction is conferred upon the County Court judge, in case of dispute, to determine the amount payable to the person who in case of emergency, and on the requisition of any general or field officer commanding Her Majesty's forces, enforced by warrant of a justice, has supplied any carriage, animal, or vessel. The jurisdiction is conferred upon the judge, not the County Court, having jurisdiction in the place in which the carriage, animal, or vessel was furnished, or through which it travelled.

BALLOT ACT, 1872, c. 33.—By this Act the County Court having jurisdiction in the borough or part thereof possesses with regard to municipal elections for the said borough the same jurisdiction over ballot papers used at such elections, as the House of Commons and the High Court possess with regard to parliamentary elections (1st Schedule, Part II. rule 64); as to which, see 1st Schedule, Part I. rule 40, and *ibid.* rule 41, as amended by Part II. rule 64.

A form of order will be found in *R. v. Beardsall*, 1876, 1 Q. B. D. 452; 45 L. J. M. C. 157; 34 L. T. 660. An appeal lies from the County Court to the High Court (1st Schedule, Part II. rule 64).

BANKRUPTCY ACT, 1883.—*Jurisdiction.*—By sec. 92 the Courts having jurisdiction in bankruptcy are the High Court and County Courts, but the Lord Chancellor may from time to time, by order, exclude any County Court from having jurisdiction in bankruptcy, and attach its district to the High Court or any other County Court, and a County Court not so excluded from jurisdiction has in bankruptcy all the powers and jurisdiction of the High Court (s. 100). The registrars of County Courts having jurisdiction in bankruptcy are given the powers and jurisdiction set out in sec. 99, subs. 2, subject to general rules limiting their powers; subs. 3 grants further powers to registrars in bankruptcy of the High Court; the Lord Chancellor may, subs. 5, by order, direct any specified registrar of a County Court to have and exercise these additional powers.

Committal.—Sec. 103, subsec. 5, gives the County Court power to commit under sec. 5 of the Debtors Act, 1869, irrespective of the amount of debt; the judge alone can exercise this power (s. 99, subs. 4; see vol. i. p. 521, *BANKRUPTCY, Imprisonment under the Debtors Act*).

Appeals.—By sec. 2 of the Bankruptcy Appeals (County Courts) Act, 1884, the appeal lies in bankruptcy matters to a Divisional Court, of which the judge to whom bankruptcy business is assigned shall be a member. An appeal can only be made to Court of Appeal by leave of the Divisional Court or Court of Appeal (see vol. i. p. 520, *BANKRUPTCY, Appeals and Rehearings*).

Administration Orders.—The County Court has exclusive jurisdiction to grant these orders (see sec. 122, and rules and forms under the said section in *Annual County Court Practice*; see also vol. i. p. 520, *BANKRUPTCY, Administration Order*).

• See also *BANKRUPTCY*, vol. i. pp. 482–531.

BILLS OF EXCHANGE ACT, 1856, c. 67, has been repealed as regards the High Court, but is still in force in the County Court. The scheme of the Act is to facilitate the remedies on bills of exchange and promissory notes; by sec. 1 all actions on these securities within six months of their becoming due may be begun by a writ of summons in special form given in Schedule A; the plaintiff, on filing an affidavit of personal service, may, in case the defendant shall not have obtained leave within twelve days to

appear, and have appeared (s. 2), sign judgment as in the form given in Schedule B. Leave to appear can (s. 2), on such terms as to security or otherwise as to the judge may seem fit, be obtained on paying into Court the sum indorsed on writ or upon affidavit disclosing a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration.

When leave to appear has been obtained and the defendant has duly appeared, the action proceeds in the same way as any other action, except that sec. 4 provides (1) that directions may be given as to the custody of the bill sued on; (2) that the plaintiff may be ordered to find security for costs, and the action stayed till he does so. The defendant may at the trial avail himself of any defence of which the facts admit.

BILLS OF SALE ACT, 1878, AMENDMENT ACT, 1882, c. 43.—Sec. 11 provides for the filing with registrars of County Courts of bills of sale given by persons residing or affecting chattels being within the County Court district (see **BILLS OF SALE**, vol. ii. p. 136).

BOROUGH AND LOCAL COURTS OF RECORD ACT, 1872.—By sec. 6, where final judgment has been obtained in an action brought in a borough or local Court of record, or where a rule or order of the judge has been made for the payment of moneys or costs, not exceeding £20, the said Court may send a writ or precept for the recovery of the same to the registrar of any County Court within the jurisdiction of which the defendant may possess any goods or chattels, to be stamped by him and executed by the high bailiff, as if it had been issued out of the County Court.

BRINE PUMPING (COMPENSATION FOR SUBSIDENCE) ACT, 1891, c. 40, s. 11.—If a compensation Board disallow a claim or any item thereof on the ground of want of title or interest, the claimant may (s. 27, subss. 1, 4), or if a Board allow a claim or any item thereof, any person assessed to the last rate made under the Act may, appeal to the County Court (s. 27, subss. 2, 4); but there can be no appeal if the amount claimed does not exceed £100 (s. 29). Compensation assessed under this Act may be recovered as a debt in the County Court within the jurisdiction of which the property to which the claim relates is situate (s. 26).

BUILDING SOCIETIES ACTS, 1874, c. 42, AND 1894, c. 47.—By sec. 4 of the 1874 Act, "Court" means County Court of the district in which the chief office or place of meeting for business of the society is situate, and such County Court has jurisdiction as follows:—

Default of Officers.—See secs. 23 and 24 of 1874 Act, and **BUILDING SOCIETIES**, vol. ii. p. 293. The procedure on applications against officers is regulated by Order 41. This jurisdiction is exclusive to the County Court.

Winding up.—See sec. 32, subsec. 4, of the 1874 Act, and **BUILDING SOCIETIES**, vol. ii. p. 298.

Disputes.—As to jurisdiction of County Court, see 1874 Act, ss. 16, subss. 9, 34, 35, and 36, and **BUILDING SOCIETIES**, vol. ii. p. 297. Proceedings (s. 35, subs. 1) are directed to be commenced by petition; under subs. 2 should be by action, commenced by plaint and summons (see Order 41, rr. 1, 2, 3).

Enforcing Decisions of Arbitrators.—By sec. 34 of the 1874 Act, where disputes are referred to arbitration pursuant to the Act and Rules, and an award is made, it is final. Should either party disobey the award, the County Court may enforce compliance on the petition of any person concerned. This jurisdiction is exclusive.

CHARITABLE TRUSTS ACT, 1853, c. 137; CHARITABLE TRUSTS AMENDMENT ACT, 1855, c. 124; CHARITABLE TRUSTS ACT, 1860, c. 136; AND CHARITABLE TRUSTS (RECOVERY) ACT, 1891, c. 17.—As to the jurisdiction of the County Court under these Acts, see article **CHARITY COMMISSION**.

Note that the County Court may not vary or make any order conflicting with any decree or order of the High Court or judge thereof. A certificate of the Charity Board that in their judgment the gross yearly income does not exceed £50, determines the question of jurisdiction (s. 44 of 1853 Act).

Each registrar must record in "The Charitable Trusts Book" all such proceedings (Order 48, r. 1), and transmit a copy of every order made to the registrar of County Court judgments.

Appeal.—The Attorney-General may appeal within three months; any other person must within one month give notice to the County Court and the Charity Board; and if the Board certify that the appeal is reasonable, may proceed therewith, but the Board may require him to be bound with two sureties, approved by the registrar, to indemnify the charity against costs, and to pay such costs as he may be ordered to pay.

COAL MINES REGULATION ACT, 1887, c. 58.—A County Court judge, sitting with or without assessors, may be appointed to hold the inquiry as to managers, referred to in article **COAL MINES**, *ante*, vol. ii. p. 54; see also as to arbitrations, same article pp. 57, 58.

● **COLLECTING SOCIETIES AND INDUSTRIAL ASSURANCE COMPANIES ACT, 1896, c. 26.**—By sec. 1 the Act applied to every friendly society or branch, whether registered or unregistered (referred to as a collecting society), and every person or body of persons, whether corporate or unincorporate, granting assurances on any one life for a less sum than £20 (referred to as an industrial assurance company), as receives contributions or premiums by means of collectors at a greater distance than ten miles from its registered office or principal place of business, and in case of an industrial society at periodical intervals less than two months. Jurisdiction of the County Court extends to—

Disputes between these societies and any member or person insured, or any person claiming through either of them or under the rules (notwithstanding any provisions in the rules of the society or company to the contrary); may be settled by the County Court or a Court of summary jurisdiction according to the provisions of the Friendly Societies Act, 1896 (s. 7).

Dissolution.—The Friendly Societies Act, 1896, ss. 78–83, as to dissolution, under which the County Court have certain jurisdiction, apply to every collecting society except that in the case of such a society having branches, these sections shall apply without the consent of the central body of the society. See Friendly Societies Act, 1896, *Dissolution*, *post*, p. 547.

COMMONS ACT, 1876.—*Jurisdiction.*—The Court of the district within which any common or part thereof is situate may, by sec. 30, hear any case relating to any illegal inclosure or encroachment made, or to any nuisance impeding the exercise of any right of common arising, after the passing of the Act, and grant an injunction or make an order for the removal or abatement.

On giving security for costs to the satisfaction of the County Court, an appeal lies to the High Court, which may reverse, modify, or confirm the order of, or may remit with directions to, the County Court; pending an appeal the order is suspended.

COMPANIES ACT, 1862.—By sec. 126 the judges of County Courts who sit at places more than twenty miles from the General Post Office, were (amongst others) made commissioners for the purpose of taking evidence under the Act in cases where any company was wound up; and the Court (see s. 81 for definition) may refer the whole or any part of the examination of any witness to such commissioner, who in the matter so referred to him has all the same powers as to the examining and punishing the defaults of witnesses, the production and delivery of documents, and allowing costs and expenses of witnesses, as the Court which made the order had. See Companies (Winding-Up) Act, 1890, *infra*.

COMPANIES WINDING-UP ACT, 1890.—*Jurisdiction.*—By sec. 1, subsec. 3, where the capital credited as paid up does not exceed £10,000, and the registered office of the company is situate within the jurisdiction of a County Court having jurisdiction in bankruptcy (Order of Lord Chancellor, 29th November 1890), a petition to wind up or to continue the winding up of a company under the supervision of the Court *shall* be presented to that County Court. The Court has, for the winding up, all the powers of the High Court (s. 1, subs. 6). The Lord Chancellor, or any judge of the High Court having jurisdiction under the Act, may at any time, for good cause, transfer to the High Court from the County Court, or from the High Court to the County Court, the winding up of a company (Companies Winding-Up Rules, 1890, r. 8); and for like good cause the judge of a County Court may transfer proceedings to any Court which has jurisdiction other than the High Court or a Palatine Court (*ibid.* r. 9).

Appeal.—None is provided for by this Act, but by sec. 124 of the Companies Act, 1862, to be read with this Act, an appeal lies from any order or decision in the winding up of a company in the same manner, and subject to the same conditions, as appeals in cases within its ordinary jurisdiction.

For the law and procedure in winding up, see *ante*, p. 210.

CUSTOM LAWS CONSOLIDATION ACT, 1876.—By sec. 284 the term “justice” when used in the Act shall include County Court judge, who may therefore exercise the jurisdiction given by numerous sections to justices. See article CUSTOMS.

DEBTORS ACT, 1869.—*Jurisdiction* under sec. 5 is given to a County Court judge sitting in open Court, by an order showing on its face the ground on which it is issued, to commit for default in payment of a sum of money ordered to be paid by a Court, whether High Court or inferior Court, and whether over or under £50 (Bankruptcy Act, 1883, s. 103 (4)).

In the County Court the debtor making default in one of the six cases excepted from the operation of sec. 4 of the Act, ought to be proceeded against by attachment; sec. 4 is amended as to Nos. 3 and 4 of the above six cases by Debtors Act, 1878, s. 1.

As to imprisonment under the Debtors Act, see vol. i. p. 521.

DEEDS OF ARRANGEMENT ACT, 1887, c. 57.—See article BANKRUPTCY, vol. i. p. 529. The copy of the deed there referred to is to be transmitted within three days.

The rules under Deeds of Arrangement Act, 1887, prescribe the way in which the above-mentioned registrars are to perform their duties.

EMPLOYERS' LIABILITY ACT, 1880.—See **EMPLOYERS' LIABILITY**.

EMPLOYERS AND WORKMEN ACT, 1875, c. 90.—By sec. 3 the County Court may, as an additional jurisdiction, in any proceeding having relation to any dispute between an employer and a workman, arising out of or incidental to their relation as such, exercise the following powers—(a) It may adjust and set off claims one against the other, whether the same are liquidated or not, or are for wages, damages, or otherwise (subs. (1)); (b) it may rescind contracts on such terms as may seem just (subs. (2)); (c) where damages might be awarded for breach of contract, it may in lieu of all or part of such damages, with the consent of the plaintiff, accept from the defendant security for the performance of the unperformed portion of the contract (subs. (3)). The same section provides that the security shall be an undertaking of the defendant, with one or more sureties, that he will perform his contract; and how the surety may recover any sum paid by him with costs.

"Workman" is defined by sec. 10.

See sec. 8 as to procedure on giving security, and Form 313.

EXPLOSIVES ACT, 1875, c. 17.—By sec. 66 a Secretary of State may, amongst other persons, appoint a County Court judge to make a formal investigation into the cause of any accident caused by an explosion, or fire in connection with any explosive, or of which notice by sec. 63 is required to be given to the Secretary of State. The inquiry must be made in open Court, and the judge shall have all the powers of a Court of summary jurisdiction, in addition to certain special powers (s. 66, subs. 3), in regard to enforcing the attendance of witnesses, the production of documents, and other matters.

EXTRAORDINARY TITHE REDEMPTION ACT, 1886, c. 54.—Any instalment of the rent-charge in arrear may be recovered by action in the High Court or County Court, in the same way and subject to like conditions that rent-charge in lieu of ordinary tithe is recoverable, or by entry upon and perception of the rents and profits of the land, subject to such rent-charge (s. 4, subs. 5). A rent-charge payable under this Act is not a tithe rent-charge under the Tithe Act, 1891 (see s. 9, subs. 2, and s. 10, subs. 4, of that Act).

FACTORY AND WORKSHOP ACTS, 1891, c. 75; 1895, c. 37.—Sec. 7, subsec. 2, gives the County Court of the district jurisdiction to compel the occupier of a factory, at the instance of the owner, to contribute towards the expense of making provisions against fire as the sanitary authority may have obliged the owner to carry out.

FINANCE ACTS, 1894, c. 30; 1896, c. 28.—By sec. 10 of the 1894 Act, anyone aggrieved by the decision of the commissioners, whether on the ground of the value of any property, or of the rate charged or otherwise, may, on payment of or on giving security for the duty, appeal to the High Court (subs. 1); where the value, as alleged by the commissioners, of the property in respect of which the dispute arises does not exceed £10,000, the appeal may be to the County Court for the place in which the appellant resides or the property is situate, as if the County Court was the High Court (subs. 5). In every case there is an appeal as of right to the Court of Appeal (s. 22 of the 1896 Act). A dispute as to the proportion of estate duty to be borne by any property or person, where the amount in dispute is less than £50, may be determined by the County Court for the county or place in which the person recovering the same resides or the property is situate (s. 14, subs. 2, 1894 Act).

Proceedings in appeals under sec. 10 of the 1894 Act are regulated by Order 38 a.

FINES AND RECOVERIES ACT, 1833 (see sec. 79, 80, 84).—An acknowledgment by a married woman under this Act may by sec. 184 of the County Courts Act, 1888, be received by a judge of a County Court in the same manner as by a judge of the High Court. The formalities to be observed are regulated by the three sections of this Act, and the High Court rules made in reference thereto.

FRIENDLY SOCIETIES ACT, 1896, c. 25.—See **FRIENDLY SOCIETIES**.

Recovery of Moneys payable by Members.—Sec. 31 gives jurisdiction to the County Court of the district in which the member resides.

Default of Officers.—Sec. 54 gives jurisdiction to the County Court or to a Court of summary jurisdiction, and the order of either such Court shall be final.

Disputes.—Decisions on disputes, in manner directed by the rules, may be enforced by the County Court. By consent the County Court may determine any dispute directed to be referred by the rules to justices or to a Court of summary jurisdiction (*ibid.* subs. 5). If the rules contain no direction as to disputes, or where no decision is made for forty days after application to the society or its branch for a reference under the rules, the County Court or a Court of summary jurisdiction may determine the dispute; but in the case of a society with branches the forty days shall not begin to run until application has been made in succession to all the bodies entitled under the rules

to determine the dispute, provided that the rules shall require no greater delay than three months between each successive determination (subs. 6).

• *Amalgamation of Societies.*—By sec. 70, subsec. 7, in cases of amalgamation, any member of or any person claiming any benefit from the funds of any “friendly society,” may apply to the County Court of the district within which the chief or any other place of business is situate, for relief or other order, and the Court has the same powers as in regard to the settlement of disputes.

Dissolution of Societies.—By sec. 78, subsec. 2, the remedy already mentioned of members and others dissatisfied in the case of the amalgamation of “friendly societies,” of applying to the County Court for relief, is given to those dissatisfied with the terms of a dissolution.

Proceedings in the County Court.—As to these, see sec. 94, and Order 41.

For what is a “friendly society,” see sec. 8, subsec. 1.

GOVERNMENT ANNUITIES ACT, 1864, c. 43.—Sec. 10 of this statute gives the County Court sole and unlimited jurisdiction in the cases with which it deals. See GOVERNMENT ANNUITIES.

GOVERNMENT ANNUITIES ACT, 1882, c. 51.—Sec. 10 of this enactment seems to give the County Court jurisdiction whatever the amount sued for may be.

GUARDIANSHIP OF INFANTS ACT, 1886, c. 27.—The County Court of the district in which the respondents or any of the respondents reside (s. 9) may appoint a guardian or guardians to act jointly with the mother (s. 2).

The said Court may confirm an appointment under sec. 3, subsec. 2. By sec. 3, subsec. 3, when guardians are unable to agree upon a question affecting the welfare of an infant, one of them may apply to the said Court for its direction, and the said Court may make such order as it shall think proper. By sec. 5, upon the application of the mother, who may apply without next friend, the said Court may make an order as to the custody of the infant, and the right of access thereto by either parent, having regard to the welfare of the infant, and to the conduct of the parents and their wishes, and may vary or discharge such order, and in every case may make such order respecting the costs of the mother and the liability of the father as may be just.

The High Court may, in its discretion, remove any guardian appointed by virtue of this Act, and appoint another guardian (s. 6), or, at the instance of any party to an application made under this Act, remove such application to the High Court, and there proceed before a judge of the Chancery Division (s. 10). An appeal shall also lie to a judge of the Chancery Division of the High Court from any order made by a County Court.

The procedure in the County Court is regulated by Order 47, and in the High Court by the Rules of the Supreme Court (Guardianship of Infants Acts).—See INFANTS.

HOSIERY MANUFACTURE (WAGES) ACT, 1874, c. 48.—Penalties for illegal deductions from wages are to be recovered by the artificer, or any other person suing for the same, in the County Court in the district where the offence is committed, with full costs of suit (s. 3).

• So also the penalties for illegal use of frames are recovered in the County Court aforesaid (s. 4). This jurisdiction of the County Court is exclusive, and is not limited in amount.—See HOSIERY MANUFACTURES.

INCLOSURE, ETC., EXPENSES ACT, 1868, c. 89.—Applications for recovery of expenses incidental to enfranchisement, etc., may be made to any County Court (s. 3). Any valuer or other person who is in possession of any document relating to an inclosure, and who fails to comply with an order by the commissioners to deliver the same to them at their office, on such default may be summoned before the judge of the County Court for the county in which the lands or any part thereof are situate, and upon the production of such order the judge shall compel the party in default to obey, as he is by law enabled to compel production of documents (s. 4).

INDUSTRIAL AND PROVIDENT SOCIETIES ACT, 1893, c. 39.—Jurisdiction is given to the County Court in the following matters:—

Recovery of Moneys payable by Members.—The County Court either of the district in which the registered office is situate, or in that in which the member resides (s. 23).

Default of Officers.—By sec. 48 the order of the Court will be final.

Winding up.—Where the capital does not exceed £10,000, and the registered office is situate within the jurisdiction of a County Court having jurisdiction in winding up (s. 58). Cp. s. 1, Companies (Winding-up) Act, 1890.

Setting aside Deeds of Dissolution.—The County Court of the district where the registered office of the society is situate, to set such dissolution aside (s. 38, subs. (e)).

Disputes.—The County Court has exactly the same power over disputes, and enforcing the decisions of arbitrators, as it has under sec. 68 of the Friendly Societies Act, 1896, which see.

The jurisdiction of the High Court would appear to be excluded as to all the above matters, save "winding up."

INEBRIATES ACT, 1879 AND 1888.—A County Court judge for the district in which a "retreat" is situate may by order authorise persons to visit anyone detained therein; and may on the report made to him discharge the detained person (s. 18, 1879 Act). The 1879 Act, which expired, is continued by the 1888 Act.

INFERIOR COURTS' JUDGMENTS EXTENSION ACT, 1882, c. 31.—By sec. 3 the registrar of an inferior Court (see Interpretation, s. 2) in England, Scotland, or Ireland may, after the time for appealing against the judgment has elapsed, grant a certificate of such judgment in the form in the schedule to the Act; upon the production (s. 4) of such certificate, purporting to be signed by the proper officer of the inferior Court, the registrar of the County Court must, on payment of the prescribed fees, register the same in the prescribed form, and all the reasonable costs of obtaining and registering such certificate shall be added to and recovered as if the same were part of the original judgment. Execution (s. 5) may then issue out of the Court in which the certificate has been registered, against the goods of the defendant within the jurisdiction.

Sec. 8 provides that costs are not, without an order of the Court, to be allowed in any action brought to enforce a judgment which might have been registered as above.

For the practice on, and the fees payable for obtaining and registering the certificate, see Order 45, Forms 314, 315.

INTESTATE WIDOWS AND CHILDREN ACTS, 1873, c. 52; 1875, c. 27.—Where the estate of an intestate does not exceed £100, his widow or child or children, residing more than three miles from the registry of the Court of Probate, may apply to the registrar of the County Court within the district of which the intestate had had his last fixed abode, to fill up the papers required for a grant of letters of administration, and to swear the applicant and attest the execution of the administration bond. The registrar shall then transmit the same by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall make out letters of administration and transmit the same to the registrar, to be by him delivered to the applicant (1873 Act, s. 1).

For the purposes of the Act the registrars of County Courts may exercise the powers of commissioners of Court of Probate (*ibid.* s. 4).

By the 1875 Act, s. 1, the above Act, which applied only to men dying intestate, was extended to the children of poor intestate widows.

JUDICIAL TRUSTEES ACT, 1896, c. 35.—The jurisdiction under this Act may be exercised by any County Court judge to whom such jurisdiction may be assigned under this Act, and subject to the prescribed definition of the jurisdiction (s. 2).

Rules may be made by the Lord Chancellor for assigning and for defining the jurisdiction to be given to County Court judges (s. 4, subs. 6); these rules have not yet been made.

LAND TRANSFER ACT, 1875, c. 87.—By sec. 114, for the purposes of the Act "the Court" means the High Court, Chancery Division, or the County Court, as may be prescribed by the general Rules; where the County Court has jurisdiction it enjoys all the powers of the Chancery Division which may be exercised in open Court or in chambers.

An appeal is given to the Chancery Division by sec. 116.

LAW OF DISTRESS AMENDMENT ACTS, 1883, c. 21; 1895, c. 24.—A general certificate authorising a bailiff to act in any part of England and Wales (r. 4 of 1888) can only be granted by a County Court judge (r. 3 of 1888); a special certificate may be granted by the judge or registrar, and must specify the particular distress to which it applies (rr. 2, 3, of 1888). The certificate may at any time be cancelled or declared void by the judge (s. 1, 1895 Act). An applicant for a certificate, who must be resident or have his principal place of business in the district of the Court (r. 1, 1895), not rated on a rateable value of £25, may be required to find security in £20 for a general, and £5 for a special, certificate (rr. 9 and 10 of 1888).

A general certificate requires to be renewed annually on or before the 1st February (r. 2 of 1895), and a list of those in force shall be exhibited in the office of every Court (r. 6 of 1895).

LITERARY AND SCIENTIFIC INSTITUTIONS ACT, 1854, c. 912.—The County Court of the district in which the principal building of the institution is situated has jurisdiction to adjust the affairs of the institution, or to direct proceedings to be taken in the Chancery Division of the High Court in cases of disputes (s. 29); and to

determine, in default of the members doing so, what institution shall receive any surplus there may be (s. 30). As to procedure, see Order 41.

• **LOAN SOCIETIES ACT, 1840, c. 110.**—By sec. 17 loans may be recovered in County Courts, notwithstanding that sec. 16 provided for their recovery by summons before a justice of the peace; by sec. 18 the plaintiff society may reduce its demand to bring the same within the jurisdiction of the County Court, provided that the amount ordered to be paid must be accepted in full satisfaction of the debt.

LOCAL GOVERNMENT (ENGLAND AND WALES) ACT, 1888, c. 41.—By sec. 75, with substitution of the County Council for the person from whom payment is claimed, and of one month for fourteen days for the period within which taxation may be claimed, the County Court has exactly the same powers as under the Parliamentary Elections (Returning Officers Act, 1875, and the Amendment Act, 1886, *post*, which see).

LOCAL LOANS ACT, 1875, c. 83.—Proceedings under sec. 12 for the appointment of a receiver may be taken in the County Court. By sec. 25 proceedings for the rectification of the register, where the value of the security to which the application relates does not exceed £50, may be taken in the County Court. The practice is governed by Order 43.

LONDON BUILDING ACT, 1894, c. 163 (PRIVATE ACT).—The award of a surveyor or surveyors under sec. 91, subs. (1), is subject to an appeal to the County Court taken within fourteen days from the delivery of the award (*ibid.* subs. 2). If the appellant satisfies the judge that a sum exceeding £50, exclusive of costs, is involved, and gives security to prosecute his appeal and to abide the event thereof, proceedings shall be stayed, and the appellant may bring an action in the High Court (*ibid.* subs. 5). By sec. 94 the County Court judge may settle the amount of security to be given by building owners and adjoining owners respectively; in cases where consent is required to be given by, any notice to be served on, or any other thing done by any owner, and no owner can be found, the judge of a County Court may, by sec. 196, give such consent, cause such thing to be done, and dispense with service of any notice.

Where jurisdiction is by the Act given to a County Court, the Court may, by sec. 168, settle the time and manner of executing any work, and may put the parties upon such terms as the Court thinks fit.

Anyone who fails to comply with any order, or who prevents a builder from complying therewith, is liable, by sec. 200, subsec. 11, to penalties.

By sec. 168 the same right of appeal as under the County Courts Act, 1888, is given. In cases coming within sec. 91, a party may either avail himself of this right of appeal or of the procedure under the fifth subsection of the said section.

LUNACY ACT, 1890, c. 5.—The powers of County Court judges as regards reception orders are dealt with in article ASYLUMS in vol. I. p. 371, *The Judicial Authority Defined*, and *passim*.

By sec. 132 the judge of County Courts having jurisdiction in the place from which the lunatic is sent, may, where the value of the lunatic's property is under £200, and no friend or relative is willing to manage such property, on application by such clerk or officer, authorise the clerk of the guardians or a relieving officer of the union to realise the property of the lunatic, subject to his rendering an account to the judge of the dealings with the said property (*ibid.* subs. 3).

• By sec. 300 an order may be made by a County Court judge for payment to the guardians of any union of expenses incurred in relation to a lunatic. Applications for orders under secs. 132 and 300 must be by petition (Order 42 B).

MARKET GARDENERS' COMPENSATION ACT, 1895, c. 27, is to be construed as part of the Agricultural Holdings Act, 1883, as to which, see *ante*, p. 542.

MARRIED WOMEN'S PROPERTY ACT, 1882, c. 75.—Special jurisdiction is by this Act given to the County Court under sec. 11, to appoint trustees of policies of life insurance effected by husbands for the benefit of their wives and children, and by wives for the benefit of their husbands and children; and under sec. 17, to decide in a summary way questions between husband and wife as to the title to or possession of property.

The judge of the district in which either party resides may, at the instance of either party or of any bank, company, or society in whose books the property in dispute stands, make the order, subject to the right of appeal and the right of the defendant to remove the case into the High Court given by the section. For the procedure under the last-mentioned section, see Order 46.

• **MATRIMONIAL CAUSES ACT, 1857, c. 85.**—A protection order under sec. 21 ought, within ten days of the making thereof, to be entered with the registrar of the County Court within whose jurisdiction the wife resides. This provision is not imperative, only directory (*In re the Goods of Betty Farraday*, 1862, 31 L. J. P. & M. 7).

MERCHANT SHIPPING ACT, 1894, c. 60.—This Act gives jurisdiction in certain actions and matters by some of its provisions only to County Courts having Admiralty jurisdiction, and by other of its provisions to all County Courts, in the exercise of their

ordinary jurisdiction; the former have been dealt with under ADMIRALTY JURISDICTION; the latter are appeals. Pilotage authorities (see PILOTAGE, and sec. 610). The procedure is governed by O. 12, r. 10 A, which, though made under the provisions of a repealed statute, are continued in force by sec. 745.

Court of Survey.—Presidency of Courts of Survey, see SURVEY (COURTS OF), ss. 487, 488, 491. The procedure is governed by the "general rules for Courts of Survey in the United Kingdom, 1876," made under the repealed Act of 1876, but continued in force by sec. 745 (see *Annual County Court Practice*, vol. ii.).

The *arrestment* of foreign ship having caused injury to the property of Her Majesty or any of her subjects, found in any port or within three miles of the coast, until the owner or master of consignee of the said ship has made satisfaction for the injury or given security to abide the event of legal proceedings (s. 688).

The *rescission* of contracts in any dispute between an owner or master of a ship and a seaman or apprentice incidental to their relation as such. This power is in addition to and independent of any other jurisdiction (s. 168; and see *ante*, ADMIRALTY JURISDICTION).

Cognisance of suits for the *recovery of wages* not exceeding £50. Such suits cannot be brought in any superior Court, nor as an Admiralty proceeding in any County Court, except in the four contingencies mentioned in the section (see ADMIRALTY JURISDICTION; WAGES); in such suits County Courts and Courts of summary jurisdiction have sole jurisdiction (as to which, see sec. 141). Allotment notes may be sued upon in County Courts or Courts of summary jurisdiction.

MUNICIPAL ELECTIONS (CORRUPT AND ILLEGAL PRACTICES) ACT, 1884, c. 70.—By sec. 21, subsec. 6, the County Court for the district in which the election was held may allow claims to be sent in after fourteen days, and an expense to be paid after twenty-one days, otherwise such claims are barred, and such payments are illegal payments (*ibid.* subs. 1).

OPEN SPACES ACT, 1890, c. 15.—If the sanction of "the Court" is necessary to conveyances under secs. 2 and 4, it may be given by the County Court in which any part of the open space may be situated (s. 2).

PARLIAMENTARY ELECTIONS (RETURNING OFFICERS) ACT, 1875, c. 84, AND AMENDMENT ACT, 1886, c. 57.—The candidate may, within fourteen days after the account is transmitted, apply in the city of London to the Lord Mayor's Court, and elsewhere to the County Court, to tax the returning officer's bill. From the taxation either party may appeal within seven days (s. 1, 1886 Act); when the claim, with vouchers, shall be transmitted to the prescribed taxing officer of the Queen's Bench Division, whose taxation may be reviewed by the said Court.

PARTITION ACTS, 1868, c. 40; 1876, c. 17.—Under these Acts the County Court has concurrent jurisdiction with the High Court where the property to which the action relates does not exceed £500 (s. 12 of the 1868 Act).

Proceedings must be by action commenced by plaint and summons.

PHARMACY ACTS, 1852, c. 56; 1868, c. 121; 1869, c. 117.—By sec. 12 of the 1852 Act, and sec. 15 of the 1868 Act, the County Court is given exclusive jurisdiction for the recovery of penalties imposed by those sections. Actions for the recovery of penalties must be brought within six months after the offence (s. 13 of the 1852 Act).

POOR LAW AMENDMENT ACT, 1848, c. 110.—By sec. 8 all relief granted by the guardians upon loan (see Poor Law Amendment Act, 1834, c. 76, s. 58, and Divided Parishes and Poor Law Amendment Act, 1876, s. 25) chargeable to the common fund of the union, or to any parish therein, may be recovered in the County Court of the district comprising the union, or the major part thereof, on the plaint of the guardians, who may be heard by any officer appointed by them for such purpose. The jurisdiction is not limited to any amount.

PRIVATE STREET WORKS ACT, 1892, c. 57.—Expenses of private street works not exceeding £50 may be recovered from the owner for the time being of the premises in respect of which they are due, in County Courts as simple contract debts (s. 14).

PROBATE ACTS (COURT OF), 1857, c. 77; 1858, c. 95.—By sec. 10 of the Act of 1858, substituted for sec. 54 (repealed) of the 1857 Act, where the registrar of the principal registry of the Court of Probate is satisfied by affidavit that the testator or intestate at the time of his death had his fixed place of abode in one of certain specified districts (Schedule A, 1857 Act), that the personal estate was under the value of £200, and that the deceased at the time of his death was not seized or beneficially entitled to any real estate of the value of £300, the judge of the County Court having jurisdiction in the place in which the deceased had a fixed abode shall have the contentious jurisdiction, and authority of the Court of Probate, as to the grant and revocation of probate or letters of administration. By sec. 57 of the 1857 Act, the affidavit of facts giving the County Court jurisdiction is conclusive, unless disproved while the matter is pending.

* By sec. 46 of the 1857 Act, probates and administrations may be granted by district registrars (s. 13 of the 1857 Act) if it appears by affidavit that the testator or intestate had a fixed place of abode within the district; by sec. 47 the same affidavit is conclusive for authorising grant of probate and administration; by sec. 48, in case of doubt as to the grant of any probate or administration, the district registrar may transmit the matter for the directions of the judge of the Court of Probate, who may forbid further proceedings by the district registrar, and leave the party to apply, if within its jurisdiction, to a County Court or to the Probate Court. See also Intestate Widows and Children Acts, 1873, and the Extension Act, 1875, *ante*, p. 548.

PUBLIC HEALTH ACT, 1875, c. 55.—Costs and expenses incurred as provided by secs. 104, 106, can be recovered in the County Court if below £50; so by sec. 261 can demands below that sum which local authorities are empowered to recover in a summary manner (see ss. 150, 257). To all sums which can be recovered summarily the limitation of time imposed by Jervis Act (11 & 12 Vict. c. 43, s. 11), viz. six months, applies in the County Court (*Tottenham Local Board v. Rowell*, 1876, 1 Ex. D. 514 (C. A.); 46 L. J. Ex. 432), but not in proceedings to enforce a charge on land under sec. 257 (*Tottenham Local Board v. Rowell*, No. 2, 1880, 15 Ch. D. 378 (C. A.); 50 L. J. Ch. 99). In this latter case the period of limitation begins to run from the completion of the works (*Hornsey Local Board v. Monarch Investment Building Society*, 1889, 24 Q. B. D. 1 (C. A.)).

PUBLIC HEALTH (LONDON) ACT, 1891, c. 76, ss. 11 and 117, subs. 2, are respectively similar to ss. 104 and 261 of the Public Health Act, 1875, *supra*.

RAILWAY REGULATION ACT, 1871, c. 78.—By sec. 7 the Board of Trade, when it considers a formal investigation as to any accident to be necessary, may direct that such investigation shall be held by a County Court judge, with the assistance of an inspector or assessor; the powers and duties of the persons holding the investigation are therein fully set out.

RIOT (DAMAGES) ACT, 1886, c. 38.—When the compensation claimed under this Act for damage by riot does not exceed £100, the County Court for any district in which any part of the police district is situate has exclusive jurisdiction (s. 4, subs. 2). The provisions of the above Act are applicable for the recovery of compensation by the owner of a vessel plundered or damaged by persons riotously assembled (*Merchant Shipping Act*, 1894, c. 60, s. 515).

RIVERS POLLUTION PREVENTION ACTS, 1876, c. 75; 1893, c. 31.—By secs. 2, 3, 4, 5, of the 1876 Act, persons who pollute or knowingly permit (s. 1 of the 1893 Act) streams to be polluted are deemed to have committed offences against the Act; by sec. 10 such persons may be ordered to abstain from committing these offences by the County Court having jurisdiction in such place, subject to such conditions as to the Court may seem just. The County Court has exclusive jurisdiction therein; but sec. 11 empowers a plaintiff under the Act to be removed into the High Court by order of a judge of that Court. An appeal is given to either party aggrieved by the decision of the Court in law, or on the merits, or in respect of the admission or rejection of evidence (s. 11). A penalty, not exceeding £50 a day, is incurred by disobedience of an order of the County Court, and may be enforced in the same manner as a judgment debt (s. 10). Two months' notice of intention to take proceedings must be given (s. 13).

• These proceedings are not of a criminal or penal nature, and complainants are entitled to discovery (*In re Derbyshire County Council v. Mayor of Derby*, [1896] 2 Q. B. 53, 297; 74 L. T. 747).

SALE OF EXHAUSTED PARISH LAND ACT, 1876, c. 62.—If there is any disputed claim to an interest in the land, or if any person entitled to such interest be under legal disability, and the amount of value in question does not exceed £50, the local Board must direct proceedings in the County Court for the settlement of the dispute, or, where no dispute, for the proper disposal of the amount (s. 3).

SETTLED LAND ACT, 1882, c. 38.—By sec. 46, subsec. 10, the powers of the Chancery Division of the High Court may, as regards land not exceeding in capital value £500, or in annual value £30, and as regards capital money arising under the Act, or securities in which the same is invested, and as regards personal chattels settled or to be settled as in the Act mentioned, if not exceeding in value or amount £500, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with, or from which the capital money arises, or in connection with which the personal chattels to be dealt with in the Court are settled. The proceedings are to be commenced by petition (Order 38, r. 1). The Act has been amended by the Settled Land Acts, 1884, c. 18, and 1890, c. 69.

SOLICITORS ACT, 1870, c. 28.—By sec. 8 every question respecting the validity or effect of an agreement between a solicitor and his client as to his remuneration may be examined into, enforced, or set aside, without any action, on motion or petition by the judge of a County Court in which the business or any part thereof was done; or if the

business was not done in any Court, and the amount does not exceed £50, by the judge of a County Court which would have jurisdiction in an action on the agreement. As to these agreements, see article SOLICITOR.

STANNARIES COURTS (ABOLITION) ACT, 1896, c. 45.—By sec. 1 the Court of the Vice-Warden of the Stannaries has ceased to exist, from the 1st January 1897, except for the purpose of concluding proceedings then pending; and all the jurisdiction and powers of the Court and its officers have been transferred to such County Courts as the Lord Chancellor may by order direct. The Lord Chancellor has, by order dated the 16th December 1896, directed that the County Courts of Cornwall be the said Courts.

The practice in matters so transferred is regulated by the County Courts (Stannaries' Jurisdiction) Rules, 1897.

SUCCESSION DUTY ACT, 1853, c. 51.—By sec. 50 any person dissatisfied with the assessment of the commissioners may, if the sum in dispute in respect of duty on such assessment does not exceed £50, upon giving, within twenty-one days after the date of such assessment, notice of appeal in writing, and within a further period of thirty days a statement of his grounds of appeal, appeal to a judge of the County Court for the district in which the appellant resides, or the property is situated, who may adjudicate upon it in the same manner as a judge of the Court of Exchequer.

TELEGRAPH ACT, 1878, c. 76.—By sec. 4 any difference arising between the Postmaster-General and the authority having the control over streets or public roads must be referred to the police or stipendiary magistrate having jurisdiction within the district; or if there be no such magistrate, to the judge of the County Court for the district. Either party dissatisfied with his award may within twenty-one days require the difference to be referred to the Railway Commissioners.

TENANTS' COMPENSATION ACT, 1890, c. 57, is to be construed as one with the Agricultural Holdings Act, 1883, and the Allotments and Cottage Gardens Act, 1887 (see *ante*, pp. 542, 543).

TITHE ACT, 1891, c. 8.—The tithe rent-charge, whatever its amount, is to be recovered through the County Court of the district in which the lands or any part thereof are situate, which has exclusive jurisdiction in the matter (s. 2, subs. 1). To enforce payment the tithe owner must file with the registrar a notice of application, with a copy for each person to be served (r. 2, Forms 1, 2, 3). The registrar fixes the day for the hearing, and serves on the owner one of the said copies and the notice prescribed (Form 4). When the occupier is liable to repay the owner, notice of such liability is to be given to the tithe owner, otherwise the owner cannot without a special certificate from the Court recover from the occupier (s. 2, subs. 6, rr. 36 to 38).

The tithe owner must file a copy of the occupier's liability notice with the registrar, who must then cause notices to be served on the occupier (rr. 46); proceedings may in certain cases be taken without naming the owner (r. 13).

A respondent desirous of opposing an application must file, five clear days before the hearing, a notice of his opposition (r. 5), with the grounds of opposition. A ground not mentioned in the notice will not be entertained, except by consent or by leave of the Court (r. 11). The registrar shall the same day send notice thereof to the applicant (r. 5). If no notice of opposition is given, and the amount is not brought into Court, the Court shall make an order as hereinafter mentioned (r. 8). If the respondent gives notice of opposition, but does not appear on the hearing, the application may be granted without proof, but the same costs shall be allowed as if a respondent had appeared (r. 10); if the respondent appears, the case will be heard in the ordinary way (r. 57). The Act imposes no personal liability on the occupier or owner in respect of tithe (s. 2, subs. 9); if the lands are not occupied by the owner, the order must find the amount due, and appoint a receiver of the rents and profits of the lands which would have been liable to have been distrained upon under sec. 85 of the Tithe Act, 1836 (s. 2, subs. 1, 3); if the lands are occupied by the owner the order must find the amount due, and instead of appointing a receiver must appoint an officer to distrain in accordance with sec. 85 of the Tithe Act, 1836; if there be no sufficient distress, the officer must report to the applicant and to the Court (r. 24); the applicant's remedy will then be under sec. 82 of the Tithe Act, 1836, to obtain possession of the lands (s. 2, subs. 2).

The rules provide what is to be done when the receiver discovers that the owner is also occupier (r. 23, Forms 12-16), or that the lands are let at such a rent as will not enable him to recover the requisite sum from the occupier (rr. 29-31, Forms 22, 24). As to rights and duties of receiver, see rr. 18-22. By sec. 8 the County Court also has jurisdiction to remit the tithe or some part thereof, where the tithe payable for the twelve months next preceding the day on which the tithe is claimed would exceed two-thirds the annual value of land used solely for agricultural or pastoral purposes, or for the growth of any timber or underwood (rr. 32-35, Forms 5 and 25-27).

By sec. 6, subsec. 2, the County Court may, at the instance of the collector of a rate,

order the owner of the land to pay, not only the amount of overdue rates out of the tithes payable by him, but also may make an order as to the payment of future rates, either generally or for a time limited by the order.

By sec. 10, subsec. 4, the County Court has, under sec. 2, jurisdiction to make an order for the recovery of the consideration money and expenses incident on the redemption of tithes (*R. v. Paterson*, [1895] 1 Q. B. 31; 64 L. J. Q. B. 20; 43 W. R. 127).

As to costs, see sec. 5, and rr. 42, 43, 52.

There is a right of appeal, not limited as to amount, to the High Court, given by sec. 7, to any party dissatisfied with and aggrieved by the determination or direction of the judge in point of law or equity, or the admission or rejection of any evidence.

TRUSTEE ACT, 1893, c. 53.—Sec. 46 enacts that the provisions of the Act with respect to the High Court shall in their application to cases within the jurisdiction of a County Court include that Court, *i.e.* in their application to trust estates or funds not exceeding £500 in value (County Courts Act, 1888, s. 67, subs. 5), and to that extent therefore the County Court has jurisdiction in (1) the appointment of new trustees under sec. 25; (2) the making of vesting orders under secs. 26–40; (3) the receiving payment into Court by trustees of moneys or securities, even where the minority of the trustees refuse to concur (s. 42; see also secs. 67, subs. 5, and 70 of the County Courts Act, 1888; see also jurisdiction under Settled Land Act, *ante*, p. 551).

Proceedings must be commenced by petition in the County Court of the district within which the persons or any of them making the application reside; the practice is governed by Order 38.

Supplemental Notes.

